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IN THE

Supreme Court of the United States

DAVIDSON MOMAH, PETITIONER

v.

CARI M. DOMINGUE, CHAIR UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AND UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Courts are sharply divided as to what constitutes an adverse employment action. The decision of the Sixth Circuit improperly held that there is no actionable discrimination and retaliation for denial of hardship transfer which is terms, condition, and privilege of employment (which resulted in the loss of leave, usage of leave, salary, and within-in-grade increase), denial of promotion that was later corrected, denial of selection to similar position, and hostile work environment, if there is no material adverse change to the term, conditions, or privilege of employment. The federal courts need a uniformed application of an "adverse employment" action.

Also, review is necessary to resolve the issue of intentional failure or refusal to investigate a discrimination claim. Several Circuits, including the Sixth Circuit, adopt the view that filing a complaint in the federal court would remedy the lack of investigation. The court further concluded that those issues that were intentionally not investigated or botched investigations are not actionable under any of the Title VII's prohibited basis. However, it is unclear which standard of proof to apply in order to overcome summary judgment for intentional failure to investigate versus a mere delay or negligent investigation.

I. Whether an employer may be immune from liability for discrimination and retaliatory discrimination under Title VII of the Civil Rights act, as amended, and a claimant be held to an impermissible burden of proof standard for denial of hardship transfers (resulting in loss of salary, leave, within-grade-increase), promotions (was

later promoted without back pay and compensatory damages), and selections (to similar positions) where there is no *materially adverse change* in the terms, conditions and privileges of employment as the court below held; only for an "*ultimate employment decision*" as two other courts of appeals hold, is in conflict with other Circuits Decisions?

II. Whether a claimant of discrimination and retaliatory discrimination could challenge a court's decline to apply the proper standard and guidelines in granting summary judgment, especially where the courts summarily dismissed the claims without reviewing or addressing some of the material disputed issues that the administrative agency intentionally refused to and/or improperly conducted an investigation in violation of his due process rights?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 11

CONCLUSION 30

APPENDIX

A- Order denying Petitioner's petition for rehearing 1a

B. Judgment of the Sixth Circuit Court of Appeals 25a

C. District Court Order Denying Motion For Reconsideration 27a

D. *Order Granting Defendant's Motion For Summary Judgment* 44a

E. Defendant's Motion For Summary Judgement 45a

F. Judge Audrey Scott's Answer to EEO Inv. Questionnaire 46a

G-Judge Audrey Scott's June 25, 2003 Deposition IN THE MATTER OF: Davidson Momah v. Carl M. Dominguez, Chair 51a

H. Relevant Provisions Involved 62a

TABLE OF AUTHORITIES

Page

CASES

ANDERSON V LIBERTY LOBBY, INC., 106 S. CT. 2505, 2511 (1986) 24, 25

BELL V. BOLGER, 708 F.2D 1312 (1983) 27

BERRY V STEVINSON CHEVROLET, 74 F.3D 980-984-86 (10TH CIR. 1996) 14, 17

BOUMAN V BLOCK, 940 F.2D 1211 (9TH CIR.), CERT. DENIED, 502 U.S. 1005 (1991) 14, 18, 20

CELOTEX CORP. V. CATRETT, 477 U.S. 317, 323 (1986) 24

FIELDER V UAL CORP, 218 F.3D 973, 984 (9TH CIR. 2000) 14

FLOWERS V SOUTHER REG'L PHYSICIAN SERV. INC., 247 F. 3D 229 (5TH CIR. 2001) 26

FOX V GENERAL MOTORS CORP, 247 F. 3D 169 (4TH CIR. 2001) 26

HARRIS V FORKLIFT SYSTEMS, INC, 510 U.S. 17, 21 (1993) 26

HENSON V CITY OF DUNDEE, 682 F. 2D 897 (11TH CIR. 1982) 26

HUNT V. CROMARTIE, 119 S.CT. 1545 (1999) 29

JORDAN V. SUMMERS, 205 F. 3D 337 (7TH CIR. 2000) 23

KERNS V. CAPITAL GRAPHICS, INC., 178 F.3D 1011(8TH 27

KOCSIS V MULTI-CARE MANAGEMENT,INC., 97 F. ED 876, 885 (6TH CIR. 1996) 15

LEDERGERGER V STANGLER, 122 F.3D 1142, 1144 (8TH CIR. 1997) 16

MATSUSHITA ELEC. INDUS. CO. V. ZENITH RADIO CORP. 475 U. S. 574, 587 (1986) 3, 25

MATTERN V EASTMAN KODAK CO., 104 F. 3D 702, 707-708 (5TH CIR. 1997) 16

MCCOTTRELL V. EEOC, 726 F. 2D 350, (7TH CIR. 1984) 23

MEDWI V. BAKER, 752 F. SUPP. 125,138 (S.D.N.Y. 1990) 21

MERITOR SAVINGS BANK FSB V VINSON, 477 U.S. 57 (1986) 26

MORRIS V OLDHAM COUNTY FISCAL COURT, 201 F.3D 784 (6TH CIR. 2000) 26

NATIONAL RAILROAD V MORGAN, 536 U.S. 101 (2002) 14

PARKER V STATE OF DEL., DEPT. OF PUBLIC SAFETY, 11 F. SUPP 2D 467, 478-79 (D.DEL. 1998) 20

RANDLETT V SHALALA, 118 F.3D 857, 862 (1ST CIR. 1997) 14, 16, 18, 19

REEVES V. SANDERSON PLUMBING PRODUCTS, INC. 530 U.S. 133 (2000) 3, 25

ROELEN V AKRON BEACON JOURNAL, 199 F. SUPP 2D 685, 692 (N.D. OHIO 2002) 20

RUGGLES V CALIFORNIA POLYTECHNIC STATE

UNIVERSITY, 797 F.2D 782, 786 (9TH CIR. 1986) 18

SCHULTZ V A[illegible]COR/AMWAY CORP., 177 F. SUPP 2D 674, 681 (W.D. MICH 2001) 14, 16, 17

SMITH V. CASELLAS, 119 F. 3D 33 (D.C. CIR. 1997), CERT. DENIED, 522 U.S. 958 (1997) 23

SMITH V. ST. LOUIS UNIVERSITY, 109 F.3D 1261 (8TH CIR. 1997) 27

SPANGLE V. VALLEY FORGE SEWER AUTHORITY, 839 F. 2D 171, 173 (3RD CIR. 1988) 25

THOMAS V. UNITED STATES, 47 FED.CL. 560 (2000) 25

VON GUNTEN V MARYLAND, 243 F. 3D 858, 864-65 (4TH CIR. 2001) 14, 17

WEAVER V. UNITED STATES, 46 FED.CL. 69 (2000) 25

WYATT V CITY OF BOSTON, 35 F. 3D 13, 15-16 (1ST CIR. 1994) 17

YARTZOFF V THOMAS, 809 F.2D 1371, 1376 (9TH CIR. 1987) 14, 17

ZUSMER V. RICHARDSON, 211 F.3D 1276 23

REGULATIONS

29 CODE OF FEDERAL REGULATIONS, SECTION 1614 ..... 3, 4

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Davidson Momah, (hereinafter Petitioner Momah) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the United States District Court for the Eastern District of Michigan granting respondent's motion for summary judgment is unreported, and is reproduced at Pet. App. D. Following the District Court's decision, that court denied petitioner Momah's motion for reconsideration of its decision. The decision is unreported and it is reproduced at Pet. App. C. The initial decision of the Court of Appeals for the Sixth Circuit affirming the District Court decision is an unpublished order and is reproduced at Pet. App. B. Following the decision of the Court of Appeals for the Sixth Circuit, that court denied a petition and amended petition for a rehearing, in an unpublished order that is reproduced at Pet. App. A.

JURISDICTION

The Court of Appeals entered judgment on March 15, 2006, affirming the decision of the District Court. {Pet. App. B}. On April 17, 2006, the court further denied a petition for a rehearing. {Pet. App. A}. On July , 2006, Justice Stevens granted Petitioner Momah's application for extension of this time to file writ of certiorari to September 14, 2006. This Court has jurisdiction pursuant to 28 U.S. C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED (see appendix)

STATEMENT

The decision below is among the latest confusion engulfing all the lower courts on the issue of adverse action and the intent of Congress when it enacted Title VII of the Civil Rights Act of 1964, amended-anti-discrimination and retaliation law. *BurlingtonNorthern Santa Fe Railway v. Sheila White*, Petitioning Number 05-259, (August 24, 2005), eloquently summarized this major conflict among the courts concerning adverse employment action, when it noted that:

> A broad conflict among the courts of appeals on a critical issue of federal employment discrimination law-namely, what acts suffice to create employer liability under Title VII's anti-discrimination and retaliation provision. On this issue, the lower courts are disarray. All twelve regional courts of appeals have addressed the issue, and the result is three different legal standards that often lead to fundamentally different results in similar cases. Indeed, conflicts attend numerous aspects of the inquiry into adverse employment actions, including whether and when job reassignments and temporary suspensions with no tangible loss are actionable. These multiple well-acknowledged and interrelated conflicts on a fundamental issue of federal employment law require this Court's review.

The anguish expressed in *Burlington Northern Santa Fe Railway* concerning this sharp division among the lowers courts is not limited to the issues brought under *Burlington Northern Santa Fe Railway* alone. Also, it involves whether a discriminatory denial of

promotions with no tangible loss of pay because of later promotions and a denial of selections to similar or nearly identical positions with no tangible loss constitute an adverse employment action. The opinions of the District Court and the Sixth Circuit suggests that there is no adverse action for denial of promotions, if there were later promotions and denial of selection to similar or lateral positions. (Pet. App. B, p. 23a and E, p. 45a). Furthermore, the issue here is so important in the sense that it deals with family, work environment, and request for hardship transfer and what constitute terms, privilege and condition of employment. All the lower courts that had the opportunity to address this issue of hardship transfer, had a different take on whether a denial of hardship transfer that is part of terms, conditions, and privilege of employment constitute an adverse action.

The above rulings on critical issues was further complicated when the lower courts undermined this court decisions and standard in the issuance of a summary judgment on the discrimination and taliatory discrimination claims that the administrative agency intentionally refused to investigate, as well as, by making findings of facts and assessment of credibility that belongs to the jury and weighs the evidence in light most favorably to the Respondent on those issues that they did decide in violation of *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U. S. 574, 587 (1986); *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133 (2000).

The EEOC recognized the apparent and growing danger to the Civil Rights Laws, when some agencies intentionally fail or botch investigation of discrimination and retaliation complaints for various reasons. Thus, in 1999 EEOC made several changes to 29 Code of Federal Regulations, Section 1614. One of the changes gives the

charging parties the power to request a hearing directly before EEOC and for EEOC to oversee the investigation of the claims. The changes further remind the EEOC judges that the issuance of summary judgment is improper on those issues that were not investigated or botched investigations without completion of the record and careful review of the entire record. However, if the charging party is an EEOC employee, where does the employee go administratively? (See www.eeoc.gov then Federal Agency and employees; Reference & Research; Regulations concerning Federal Sector EEO: 29 CFR Part 1614; 29 CFR Part 1614, incorporating the July 12, 1999 changes). Hence, the petition should be granted.

A. Summary of the Allegations

Petitioner Momah, an African black male, began his employment with the Respondent as an investigator at a GS level 7 on April 4, 1994, in Detroit. In April 1997, Petitioner Momah was selected by Judge Audrey Scott as an Administrative Judge (AJ)in the Respondent's Memphis District Office. (Pet. App. B, p. 3a).

Petitioner Momah moved to Memphis in April of 1997 with the belief that his wife and minor daughter would soon join him after he got settled. Petitioner Momah's plans to remain in the Memphis area subsequently changed after his 10-year old daughter suffered a fractured leg in August of 1997. Within the year, she was diagnosed with scoliosis (curvature of the spine) and needed major medical intervention and treatment. Almost simultaneously with his daughter's medical problems, Petitioner Momah was physically assaulted at a gas station by a white supremacist who uttered racial slurs before fleeing. (Pet. App. B, p.3a-5a). Furthermore his wife, now fearful of racists attacks in the South, refused to relocate to Memphis. This led

Petitioner Momah to make the decision to return to Detroit. {Pet. App. B, p. 3a and E, p. 31a}.

B. Hardship Transfer Requests

From January of 1998 through 2001, Petitioner Momah repeatedly requested a hardship transfer to the Detroit office following her daughter's injury. All his requests were denied by Mr. James Neely, Detroit District Director, Mr. Ralph Soto, Supervisor, Field Management Program Office, Mr. Walter Grabon, the Director of the Memphis District Office, Ms. Jacqueline Bradley, Director, Field Management Program Office, and Ms. Elizabeth Thornton. The Respondent cited low inventory and lack of funded position in the Detroit District Office as a reason for denying the Petitioner Momah's hardship transfer request. {Pet. App. B, 4a, 6a, and E, p. 31a-32a).

Petitioner Momah requested to carry his Memphis cases to Detroit and pay for all the necessary expenses. The request was denied. **Petitioner Momah requested a temporary detail to the vacant Administrative Judge position or to investigator position in Detroit, as well as any other suitable position.** The request was denied. {Pet. App. B, p. 5a}.

In or about September 1999, Respondent granted a transfer to Mr. Dan Dushman, white male, back to the Detroit District Office while Petitioner Momah's September 11, 1999, hardship request was still pending. Mr. Dushman was granted transfer back because he was having a work related problem in Albuquerque District Office. {Pet. App. B, p. 7a, 8a, and E, p. 39a-40a }. In addition to Ms. Dushman, Ms. Judith Fournalik, white female, was granted transfer to Detroit District Office to attend law school. {Pet. App. B, 9a}.

While granting the above transfer, Respondent

once again denied Petitioner Momah's September 11, 24, and October 2, 1999, hardship transfer requests citing low inventory and lack of funded positions in the Detroit District Office. {Pet. App. B, p. 8a). On October 13, 1999, Petitioner Momah contacted Mr. Miller and lodged a complaint. {Pet. App. B, p. 8a}. The EEO accepted the complaint; and, the complaint mysteriously disappeared from the EEO office.

Shortly after Petitioner Momah provided evidence of his timely EEO contact, the complaint was reinstated. Following the acceptance of Petitioner Momah's complaint, respondent accused him having performance problem, reassigned/transferred Ms. Deborah Barno, white female, to that very vacant and unfunded AJ position in spite of her performance related problems. {Pet. App. B, p. 7a, 9a and E, p. 32a, 36a, 38a}.

Shortly after the above transfers, Respondent transferred Ms. Linda Stankovich, white female, who left Detroit for the respondent's headquarters office, back to Detroit Office and to a different position. {Pet. App. B, p. 9a}. In addition, Linda Hoffman, white female, who had resigned as a budget analyst in the midst of serious problems, was later permitted to transfer and/or return to the Detroit office. This denial resulted in Petitioner Momah losing a significant portion of his salary, within grade increase, annual and sick leave. Mr. Dushman and others who were treated better did not suffer or incur the above loss.

C. Denial/Delaying of Promotions

In October 1998, the Petitioner and Judge Barbara Kimmelman, white female, were supervised by Judge Audrey Scott. Prior to the end of the fiscal year, Judge Scott became ill. Shortly there after, she went on

a medical leave.

In November 1998, Mr. Grabon promoted Judge Kimmelman even though she was not due for promotion; and then told Petitioner Momah whose promotion was due to wait for Judge Scott return's from the medical leave to promote him. Judge Scott advised Mr. Grabon through Ms. Doris Wood to promote Petitioner Momah because Petitioner Momah was instrumental in elevating the district to a good standing nationwide, both refused. Petitioner Momah was eventually promoted when Judge Scott returned from the medical leave. {Pet. App. E, p. 45a, F, and G, p. 52a-57a}.

Petitioner Momah lodged an EEO contact; and the matter was referred to the Respondent's mediation unit.

In or about November 1999, Petitioner Momah's promotion was again due. Judge Scott referred Petitioner Momah for promotion because Petitioner Momah conducted approximately Ninety percent of all the hearings in the district. Again, it was denied while Judge Kimmenlman who was less productive was promoted. In denying the promotion, Mr. Grabon and Ms. Wood took the view that Petitioner Momah had to wait for one year from his last promotion. Judge Scott disagreed. In recommending the promotion, Judge Scott advised Ms. Wood that Petitioner Momah's last promotion was held because she was on medical leave and not that Petitioner Momah did not deserve to be promoted during the period in question. Judge Scott further considered the e-mail or memo from the personnel technician who had also taken the view that Petitioner Momah did not have to wait the entire one year of the last promotion period. (Pet. App. G, 57a-58a}.

D. Transfer to Indianapolis

In April of 2000, Petitioner Momah transferred to the Indianapolis District Office based upon the presentations from Ms. Jacqueline Bradley that Petitioner Momah would be transferred to Detroit when a position became available. Unfortunately, the transfer to Indianapolis was not an attempt to place him closer to his family in Detroit, but to retaliate against Petitioner Momah for his EEO filing. Immediately upon his arrival in Indianapolis, Petitioner Momah suffered what could only be described as "a living hell." Petitioner Momah's work environment included, but not limited to his work being severely micro managed and scrutinized, his leave requests questioned repeatedly before they were approved, credit for the work he did was given to another AJ, supervisor discussed Petitioner Momah with employees, placed on AWOL, supervisor raised her voice on Petitioner Momah, while on medical leave Petitioner Momah's belongings were boxed and placed in the storage room without his knowledge, upon his return, he was placed in an office in front of the office's busiest copy machine, initially denied compensatory time while the same was approved for his counterpart with no question asked, among other things. {Pet. App. B, p. 10}.

E. Respondent Intentionally Refused to Investigate Subsequent Timely Raised Complaints

Throughout Petitioner Momah continued to document supplemental and new claims with the Respondent's EEO Office. The Respondent refused to investigate or review supplemental and new claims as

required under Respondent's policies. The subsequent complaints were as follows: (1) On May 25, 2001, Petitioner Momah was told to apply for the vacant AJ position in Detroit, rather than being transferred under hardship. Petitioner Momah did, but he was not selected; (2) In May 2001, Petitioner Momah applied for a position in Memphis because of the Petitioner Momah's situation in Indianapolis, but was not selected;[2] (3) Between June 2000- 2001, Ms. Laurie Young had sent misleading information to the Office of Workers Compensations Programs (OWCP)and subjected him to a hostile work environment; and (4) In July 2001, the Detroit District Office circulated false and negative job references regarding his work performance.

On August 30, 2002, Petitioner Momah filed an action in the United States District Court against the Respondent.

F. The Decisions Below

A hearing on the Respondent's Motion for Summary Judgment was held on October 20, 2003, and at the conclusion of the hearing, the district court granted summary judgment dismissing Petitioner's complaint in its entirety. In dismissing the complaints, the district court noted as follows:

2After Chief Judge Audrey Scott found out the Petitioner Momah's predicament and the hostility that he was being subjected to in Indianapolis, she requested that the Petitioner Momah be returned to Memphis. Mr. Grabon and Ms. Wood advised the Petitioner Momah to submit an application. He did, but was not even granted an interview. In June 2001, Ms. Young, who was Mr. Neely's best friend, was removed from Petitioner Momah's chain of command. The hostile work environment ceased instantly. Shortly after Ms. Young was removed from Petitioner Momah's chain of command, Judge Scott retired.

> An AJ position did not exist at the time he was seeking his transfer to that position. **And as for the investigatory position, the defendants have presented substantial legitimate reasons for not granting the plaintiff that position**...
>
> Summary judgment is also granted on his claim of delay of promotion. **He was granted a promotion soon after his supervisor recommended him for it...**
>
> In addition, **he has failed to present evidence of any similarly situated employee who was granted reassignment to an administrative judge position in Detroit during the time period during which he was requesting a transfer.**
>
> So his motion for summary judgment on that issue alone must be granted, the defendants' motion...
>
> Finally, **the retaliation claim is subject to summary judgment because the plaintiff has failed to establish a causal connection between his filing of an EEO complaint and being denied a hardship transfer**. Without that element, there can be no claim, and therefore, summary judgment must be granted on that claim.

(Emphasis added). {Pet. App. E, p. 43a-46a}.

An Order granting summary judgment was entered on October 30, 2003. {Pet. App. D}. A timely

motion for reconsideration and motion for oral argument were filed on November 7, 2003. On December 18, 2003 an order of the District Court was entered denying Petitioner Momah's motion for reconsideration. {Pet. App. C}.

On March 15, 2006, the Sixth Circuit issued a judgment summarily affirming the district court issuance of summary judgment. In dismissing the complaint, the Sixth Circuit Court noted that the Petitioner Momah did not suffer an adverse employment action.{Pet. App. B, p. 21a-22a}. The Sixth Circuit further affirmed the district court dismissal of other claims including those that were never investigated (hostile work environment in Indianapolis, denial of selections in the Respondent's Detroit and Memphis District Offices) by the Respondent. In affirming the district court decision, the Sixth Circuit court noted that Petitioner Momah was not retaliated against when his promotion was denied, his mid-range performance ratings were negative, some of his claims were not investigated, and he was denied a hardship transfer.[3] {Pet. App. B, p. 22a-23a}.

Shortly, after the Sixth Circuit court issued its opinion, a request for a rehearing was requested, but it was denied. {Pet. App. A}.

REASONS FOR GRANTING THE PETITION

The decision of the Sixth Circuit improperly held that there is no actionable discrimination and retaliation for denial of transfer under hardship (which resulted in the loss of leave, usage of leave, salary, and within-in-

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3The Sixth Circuit did not decide whether the Petitioner Momah was a victim of discrimination, when he was denied a promotion in 1998 in the Memphis District Office.

grade increase) and denial of promotions (that were later corrected), if there is no material adverse change to the term, conditions, or privilege of employment. The court further concluded that those issues that were intentionally not investigated or botched are not actionable under any of the Title VII's prohibited basis.

On the first issue, the federal courts of appeals are sharply divided on what constitute adverse employment action. This court's review is necessary to bring uniformity and certainty to this badly muddled area of law.

Second, review is necessary to resolve the issue of intentional failure or refusal to investigate a discrimination. This court has not clearly addressed this issue. The Seven Circuit and other circuits which had addressed this issue uniformly adopt the view held by the Sixth Circuit which is that a plaintiff could remedy a botched investigation by filing a complaint in the federal court, therefore, rendering any issue of intentional botched-investigation, as failure to state a claim.

However, none of the circuits, as well as this court have clearly addressed a situation as in this matter where the act is intentional, and it is based on prohibited basis under Title VII of the Civil Rights Act, as opposed to mere delay or negligence and the burden of proof required for intentional refusal to conduct a statutory mandated investigation.

In so ruling, circuits over looked the immense benefits generated from the investigation such as flushing out the true facts, preventing frivolous claims from being initiated, reducing the financial burden experienced by the charging parties who may be forced to go federal court because the agency refused to investigate their civil rights complaints.

Besides, the federal court should not be used as

an investigative agency of the executive branch. It is not part of the federal courts' responsibility under the article III of the constitution. However, if the courts assume the investigative responsibility, it is presumed that the courts will conduct an investigation in the manner prescribed by law.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT AMONG CIRCUIT COURTS REGARDING THE STANDARD OF PROOF FOR DISCRIMINATION AND ANTI-RETALIATION (ADVERSE ACTION)PROVISION OF TITLE VII

A. Certiorari Is Needed To Resolve the Entrenched Conflict of Authority involving adverse employment action and the Issue Keep Recurring

This case presents an important issue of law involving adverse employment action in discrimination and retaliatory discrimination cases and the split among the federal courts.

On March 15, 2006, the Sixth Circuit issued an order affirming the decision of the district court's grant of summary judgment in favor of the Respondent on Petitioner Momah's claims of discrimination and retaliation. The Sixth Court ruled that although Petitioner Momah had established three elements of a prima facie case for discrimination, he did not prove that he suffered an 'adverse employment action'. The Sixth Court defined adverse employment as: A"materially adverse" change in the terms or conditions of employment is typically characterized "by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to

a particular situation." *Hollins*, at 662. Under this definition, it would appear that a purely lateral transfer or denial of the same, which by definition results in no decrease in title, pay or benefits, is not an adverse employment action. Pet. App. B, p. 18a-19a].

Petitioner Momah contends that this decision is not consistent with the other circuit courts, and also that it contradicts the United States Supreme Court's reasoning and interpretation of the requirements of Title VII and *Burlington Northern Santa Fe Railway Co., v. White*, 548 U.S.__(2006).[4] Petitioner Momah also contends that this panel in affirming the district court erred by narrowly interpreting and restricting its definition of 'adverse employment'. This decision also conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed this issue, as well as the spirit and intent of Title VII , 42 U.S.C. section 2000c-3. *See Von Gunten v Maryland*, 243 F. 3d 858, 864-65 (4th Cir. 2001); *Bouman v Block*, 940 F.2d 1211 (9th Cir.), *cert. denied*, 502 U.S. 1005 (1991); *Yartzoff v Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *Berry v Stevinson Chevrolet*, 74 F.3d 980-984-86 (10th Cir. 1996) and *Wideman v Wal-Mart Stores, Inc.*, 1453, 1456 (11th Cir. 1998). *See also Schultz v Alticor/Amway Corp.*, 177 F. Supp 2d 674, 681 (W.D. Mich 2001), *aff'd*, 43 Fed. Appx. 797, 2002 WL 1787981 (6th Cir. Aug. 1, 2002)(NO. 01-2709), and *Randlett v Shalala*, 118 F.3d 857, 862 (1st Cir. 1997).

In so narrowly defining adverse employment

4*See Fielder v UAL Corp*, 218 F.3d 973, 984 (9th Cir. 2000), judgment vacated on other grounds, 122 S. Ct. 2583 (2002), (term "discriminate" as used in 42 U.S.C. section 2000c-3 is not limited to "ultimate employment decisions"). *In addition, the U.S. Supreme Court recognized the denial of a transfer request as a cause of action in National Railroad v Morgan*, 536 U.S. 101 (2002).

actions, the Sixth Court failed to adequately distinguish the ways requests for a hardship transfer versus a unilateral decision by an employer to transfer an employee are different. Hardship transfer requests are always personal in nature and unique to each individual and requests for transfers are generally offered by the employer as a benefit of employment. Petitioner Momah further contends that the Sixth Circuit Court panel's decision to exclude requests for hardship transfers from its definition of an "adverse employment action" renders a result that is not consistent with the other circuit courts, and a result that contravenes the United States Supreme Court's reasoning and interpretation of the requirements of Title VII anti-discrimination and retaliation laws.

The Sixth Circuit court defined adverse action as a material adverse change including a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished job responsibilities, or other indices that might be unique to a particular situation. *Kocsis v Multi-Care Management,Inc.*, 97 F. Ed 876, 885 (6th Cir. 1996).[5] However, the Sixth Circuit

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5The denial of his transfer request resulted in the loss of benefit that the Respondent frequently offers as a benefit of employment. Requests for hardship transfers are unlike involuntary or unilateral transfers made by the employer. All requests for transfers are personal and "unique to a particular" person and/or situation". As a result of the denial, Petitioner suffered extreme stress and depression, he used significant amounts of his sick time and annual leave, expended large sums for travel, and depreciated the value of his automobile, loss his sick and annual leave, loss his within grade increase. *Thus Petitioner Momah incurred significant costs his white comparators did not receive because they were granted hardship transfers, promotions, and selections.*

court excludes, retaliatory denial of promotion[6], selections, and hostile work environment under the ground that the Petitioner Momah did not suffer adverse action.

There is a recognized severe "split among the circuit courts" regarding what constitutes an adverse employment action. *Schultz v Alticor/Amway Corp.*, 177 F. Supp 2d 674, 681 (W.D. Mich 2001), *aff'd*, 43 Fed. Appx. 797, 2002 WL 1787981 (6th Cir. Aug. 1, 2002)(NO. 01-2709), *Randlett v Shalala*, 118 F.3d 857, 862 (1st Cir. 1997). Specifically, courts are divided about whether, in order to qualify as an adverse employment action, "the action must be an ultimate employment action such as hiring, firing, or promoting[,] or whether a mere alteration of the terms or conditions of employment will suffice." *Id.* Only the Fifth and Eighth Circuits adhere to the "ultimate employment decision" doctrine. *Ledergerger v Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (only adverse employment actions that "rise to the level of an ultimate employment decision [are] intended to be actionable under Title VII"); *Mattern v Eastman Kodak Co.*, 104 F. 3d 702, 707-708 (5th Cir. 1997)(ultimate employment decisions include hiring, discharging, promoting, compensating, or granting leave, but not "events such as disciplinary filings, supervisor's reprimands, and even poor performance by the

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6There are two promotion in issues here, 1998-1999 and 1999-2000. The District court ruled on 1998-1999 promotion, but did not rule on the back pay. {Pet. App. E, p. 45a}. The District Court believed that since Petitioner Momah was later promoted, he was no longer a victim of discrimination and retaliation. In other words, there is no adverse action. This is clearly not consistent with the law. The Sixth Circuit court ruled on 1999-2000 denial of promotion, but did not address the 1998 denial of promotion and the back pay, even though the Petitioner Momah was later promoted. {Pet. App. B, p. 23a}.

employee-anything which *might* jeopardize employment in the future').

On the other hand, the First, Fourth, Ninth, Tenth, and Eleventh Circuits "have all held that protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions." *Schultz v Alticor/Anway Corp.*, 177 F. Supp 2d at 681; *see Wyatt v City of Boston*, 35 F. 3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge are covered by Title VII's anti-retaliation provision and listing as examples, "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees")(internal citation omitted); *Von Gunten v Maryland*, 243 F. 3d 858, 864-65 (4th Cir. 2001) (explicitly rejecting *Mattern* and requiring only that there be "evidence that the challenged discriminatory acts or harassment adversely affected, 'the terms, conditions, or benefits' of the plaintiff's employment"); *Yartzoff v Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)(holding that such non-ultimate employment decisions as "*[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions'*"); *Berry v Stevinson Chevrolet*, 74 F.3d 980-984-86 (10th Cir. 1996)(construing Title VII's anti-retaliation provision to reach beyond ultimate employment decisions and to protect an employee from a malicious prosecution action brought by former employer); *Wideman v Wal-Mart Stores, Inc.*, 1453, 1456 (11th Cir. 1998) (after summarizing circuit court cases, the Eleventh Circuit stated its decision to join the majority in holding that adverse employment action is not limited to ultimate employment decisions).

A number of federal courts have held that the denial of a geographical transfer can constitute an

adverse employment decision. Thus in *Bouman v Block*, 904 F.2d 1211 (9th Cir.), *cert. denied*, 502 U.S. 1005 (1991), the evidence showed that the plaintiff deputy sheriff was denied a transfer to a different law enforcement station (the Norwalk station) in retaliation for filing a complaint with the EEOC. The defendant county contended that the plaintiff showed no adverse employment action from the denial of her transfer request. Disagreeing, the Ninth Circuit sated as follows:

> Bouman must show that the County took some action in response to her exercise of Title VII rights....In *Ruggles v California Polytechnic State University*, 797 F.2d 782, 786 (9th Cir. 1986), **we held that "the closing of a job to plaintiff and the loss of opportunity to even compete for the position" established an adverse employment decision resulting from retaliation. Bouman need not show that she was fired, demoted or suffered some financial loss as a result. The fact that the position was not made available to her because of her involvement in protected activities is sufficient.** 940 F.2d at 1229. (Emphasis added).

The Ninth Circuit's decision in *Bouman* was subsequently followed by the First Circuit in *Randlett v Shalala*, 118 F.3d 857 (1st Cir. 1997).[7] After filing a

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7This Sixth Circuit stated that it was rejecting the "uniform authority based on the First Circuit's remark in *Randlett v Shalala*, 118 F.3d 857, 862 (1st Cir. 1997), refusing to 'accept the ...view that a refusal to transfer is automatically outside Title VII.'" (Pet. App. B, p. 24a). Petitioner Momah respectfully submits that the reasoning of *Randlett* was not simply a 'remark" or dicta, but a well reasoned opinion consistent with the intent and spirit of Title VII decisions.

complaint with the EEOC, the plaintiff in *Randlett*, who had an aging mother in Boston whose health was failing but worked in the Denver office of the federal Department of Health and Human Services (HHS), applied for and was denied a hardship transfer to the HHS' Boston office. Randlett's complaint alleged that the refusal to grant the hardship transfer was in retaliation for Randlett's previous Title VII employment discrimination complaint against HHS, stating that hardship transfers were routinely granted to individuals with hardship requests similar to or less serious than Randlett's. Randlett further submitted affidavits from HHS employees attesting that HHS did approve hardship transfers with some regularity. The district court nevertheless accepted HHS' argument that the refusal of a lateral transfer to another office of the agency does not rise to the level of an adverse employment action under Title VII, even if done for an improper motive.

On appeal, the First Circuit disagreed with the district court's ruling of law. The court pointed out that Title VII states that an employer may not "discriminate" against an employee or applicant "because [the employee or applicant] has made a charge... or participated in any manner" in a Title VII investigation or proceeding. 42 U.S.C. section 2000c-3(a). The court further pointed out that "[e]lsewhere, the statute lists actions that can constitute discrimination, specifying a refusal to hire, a discharge, or any discriminatory treatment with respect to "compensation, terms, conditions, or privileges of employment." *Randlett*, 118 F.3d at 862, citing 42 U.S.C. section 2000c-2(a). The court then stated that these "two sections should be read together." *Id.*

The First Circuit further observed that "terms, conditions, or privileges " is pretty open ended language" which "obviously includes opportunities that

are not strictly entitlements." *Id.* The appeals court reasoned that "Randlett's affidavit make clear that at HHS a permanent transfer for hardship reasons is a common enough practice and so arguably a 'privilege of employment." The court then concluded as follows:

> For Randlett, the transfer here was doubtless as important as a promotion. Assuming an improper motive, it is hard to see why denial of a hardship transfer in this case could not be discrimination under Title VII. *See Bouman v Block*, 940 F.2d 1211, 1229 (9th Cir.), *cert. denied*, 502 U.S. 1005... (1991).

Id. In other words, "given the impact *Randlett*, and her affidavits about customary practice, we cannot accept the HHS view that a refusal to transfer is automatically outside Title VII." *Id. Accord Anderson v Phillips Petroleum co.*, 861 F.2d 631, 635 (10th Cir. 1988) (Phillips took adverse action subsequent to ADEA charge by failing ~~to honor~~ an employee's request to be transferred before refinery was permanently closed); *Parker v State of Del., Dept. Of Public Safety*, 11 F. Supp 2d 467, 478-79 (D.Del. 1998) (denial of requested transfer constituted adverse employment action; "the denial of a position for which the plaintiff applied is an adverse action, whether it is considered a hiring issue or a job opportunities issue"); *cf . Roelen v Akron Beacon Journal*, 199 F. Supp 2d 685, 692 (N.D. Ohio 2002) (employee did not establish that she suffered any adverse employment action where she was not fired, suffered no lost pay, and had the opportunity to bid on and receive new assignments in better geographical work areas). In reviewing these holdings, the instant case clearly contradicts established law of other circuit courts.

The Sixth Court's reliance upon this court's decision in *Kocsis v Multi-Care Mgmt., Inc.* 97 F.3d 876, 881 (6th Cir. 1996) a disability discrimination case is distinguishable from the instant case.[8] *Kocsis* is simply not applicable because it does not involve the denial of a hardship request to transfer to an office in a different city in another state, promotions, and selections, but rather it involves a non-geographical job reassignment. Given the common practice of the Respondent to grant hardship transfer/detail requests, the denial of Petitioner's requests for discriminatory and prohibited reasons constitute the denial of a privilege of employment or a job opportunity, thus clearly amounting to an adverse employment action, a situation not present in *Kocsis*. Involuntary transfers to distant cities have been considered an adverse employment actions, even where the positions in question are in all material respects identical. *See, e.g., Medwi v. Baker*, 752 F. Supp. 125,138 (S.D.N.Y. 1990) (a reasonable trier of fact could find that involuntary transfer from New York to Los Angeles on one month's notice could be a "materially adverse", action, even though employee's relocation expenses would be paid and his new position would be identical to the position he held in New York).

B. The Issue Is Important And Keep Recurring

The division and confusion between the circuits are so severe that a review by the court is needed. To further support a need for a review is the fact that this

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8*Kocsis* held that a nurse's reassignment from a nurse supervisor position to a unit nurse position was not a materially adverse change in employment, although the new duties involved more physically demanding tasks, because the nurse did not lose any pay, benefits, or prestige. *Kocsis*, 97 F.3d at 886-87.

issue is constantly recurring in different facets of Title VII issues. The number of charges filed before the Equal Employment Opportunity Commission (EEOC) bears testimony to the frequency of occurrence of adverse employment action issue. In 1992, total charge taken reflecting Title VII retaliation was 10,499. While in 2005, total charge taken reflecting Title VII retaliation was the 19,429. Other bases of discrimination such as race, disability, sex, color, and national origin that implicate adverse action analysis have also witnessed a significant increase over the years. www.eeoc.gov/stats/charges.html.

Another critical importance for review is to ensure that the law is applied equally to all under similar circumstances.

Finally, to allow this different treatment to stand or the requirement of adverse action where there is an obvious acts of discrimination would effectively eviscerates the Civil Rights laws-a result not wanted by the judicial system.

II. PUBLIC POLICY MANDATES A UNIFORM BURDEN OF PROOF STANDARD

A. Review is warranted because the decisions of the Administrative agency to deliberately refuse to Investigate subsequent discrimination complaints and the lower courts' decline to follow the Court's standard in the grant of summary judgment, undermined the spirit and intent of the united states anti-discrimination laws and this court's summary judgment standard

Regarding intentionally botched or refusal to further investigate claims of a meritorious nature and

the granting of summary judgment on those issues that were not investigated, have not been addressed by the Circuit Courts. This is a new and emerging issue of great importance because it goes to the heart of prevention of discrimination under Title VII, as well as other laws that deals with investigation and prevention of discrimination.

However, those few circuits that had the opportunity to address botched investigations universally held that there is no separate cause of action for a botched investigation; and that the remedy for a botched investigation is for the charging party to file a claim in the federal court. *Jordan v. Summers*, 205 F. 3d 337 (7th Cir. 2000); *Zusmer v. Richardson*, 211 F.3d 1276 (2000 WL 219745 (9th 2000); *Smith v. Casellas*, 119 F. 3d 33 (D.C. Cir. 1997), cert. Denied, 522 U.S. 958 (1997); *McCottrell v. EEOC*, 726 F. 2d 350, (7th Cir. 1984). Nevertheless, these circuits did not address a situation where an agency, intentionally and for retaliatory and discriminatory reasons, prevents the processing of a discrimination complaint. As such, the courts dismissal of those claims that were not investigated on summary judgment without reviewing and considering the discriminatory aspect of the claims are improper. In addressing the issue of failure or botched investigation, the lowers courts did not consider the benefits associated with having the agency conduct an investigation. Such benefits include, but not limited to having a free and unbiased investigation at no cost to the charging parties, and easier to handle and manage by pro ses or uneducated charging parties (not all complainants could afford to proceed to the federal courts), weeding out frivolous claims and streamlining issues for processing before the agencies and the courts.

However, Petitioner Momah contends that the federal courts should not be used as an investigative

tool of the executive branch, and that matters of this sort should be remanded back to the respondents with instructions. To allow the remedy announced by the lower courts to stand, would work a great injustice to the anti-discrimination laws and to those charging parties with legitimate claims. The respondent, as well as those in similar positions, would continue to refuse or botch the investigation of discrimination and retaliation complaints for various reasons, so long as it frustrates the charging party and forces them to go the federal court with rigorous rules and guidelines.

Therefore, the lower courts' grant of summary judgment on those issues that the Respondent intentionally refused to investigate, as well as weighing the evidence and making findings of facts on the investigated issues was improper. Fed.R.Civ.P. 56(c) states in pertinent part that "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." The respondent, as the moving party, bears the initial burden of showing that no genuine issue of material fact is present. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the Respondent's burden has been met, the nonmovant, Petitioner Momah in this case, must present specific facts showing that there is a genuine and material issue remaining in the case that precludes summary judgment. In other words, he is required to show that "there are genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). However, if Petitioner Momah is prevented from obtaining material through a proper investigation, the non-movant's burden becomes impossible to

overcome; it would be difficult to obtain evidence to support the alleged genuine factual dispute. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U. S. 574, 587 (1986); *Anderson*, 477 U.S. at 249-50; *Celotex Corp. v. Catrett, Id.* (1986); *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133 (2000).

Petitioner Momah was never given an adequate investigation to provide further substantial proof of his claims. *Spangle v. Valley Forge Sewer Authority*, 839 F. 2d 171, 173 (3rd Cir. 1988). Investigations provide due process. *Thomas v. United States*, 47 Fed.Cl. 560 (2000). Petitioner Momah was entitled to due process in the investigatory stage, not being shuffled and retaliated against by his employer. *Weaver v. United States*, 46 Fed.Cl. 69 (2000). Pursuant to the above standard, the lower courts' issuance of summary judgment was improper especially in light of the fact that hostile work environment in Indianapolis, denial of selections in Detroit and Memphis District Offices were never investigated by the agency. The district court touched superficially the events in Indianapolis. {See Pet. App. B, p. 10a, and E, p. 44a}. However, the Sixth Court did not rule whether or not Petitioner Momah was a victim of hostile work environment in Indianapolis District Office. Neither courts addressed the discrimination and retaliatory discrimination selection of Judge Schostal, white female, in Memphis District Office and the non selection of Petitioner Momah. Judge Schostol. {Pet. App. G, p. 59a-61a}. Judge Schostal resigned from Respondent, and she was brought back by the Respondent. {Pet. App. G, p. 59a}.

By deviating from the applicable standard as cited above and by failing to be given an adequate investigation of claims, Petitioner Momah was hurt in not only the amount of genuine evidence but also being held to a high standard without access to the evidence.

There was no evidence to support the Respondent's legitimate non-discriminatory purpose. Moreover, Petitioner Momah was denied access to the judicial system to obtain an investigation to demonstrate that the Respondent's non-discriminatory purpose was meritless.

In addition, the lower courts failed to provide any decision regarding the Petitioner's allegations of harassment. Harassment of an employee that would not occur but for the employee's EEO activity is unlawful, if it is sufficiently severe or pervasive to alter the conditions of the complainant's employment. *See Harris v Forklift Systems, Inc*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank FSB v Vinson*, 477 U.S. 57 (1986). To establish a prima facie case of hostile work environment harassment, appellant must show that: 1) he belonged to a statutorily protected class, 2) that he was engaged in statutorily protected EEO activity, 3) that he was subjected to harassment in the form of unwelcome verbal or physical conduct because of his prior EEO activity, and 4) the harassment complained of was severe or pervasive as to alter the conditions of his work environment by creating a hostile or abusive situation, or that the harassment had the purpose or effect of unreasonably interfering with his work performance and/or creating an intimidating, hostile or offensive work environment, and 5) there is a basis for imputing liability to the employer. That is, the appellee knew or should have known of the harassment but failed to stop it. *See Henson v City of Dundee*, 682 F. 2d 897 (11th Cir. 1982); *Flowers v Souther Reg'l Physician Serv. Inc.*, 247 F. 3d 229 (5th Cir. 2001); *Fox v General Motors Corp*, 247 F. 3d 169 (4th Cir. 2001).[12]

12*See Morris v Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000). Severe or pervasive harassment linked to an individual's protected activity can be challenged under Title VII.

Petitioner Momah was subjected to a pattern of harassment. When he arrived in the Indianapolis District Office, he was subjected to harassment which included: 1) his requests for travel leave to visit with his daughter were repeatedly questioned and monitored, 2) he was yelled at and compensatory time denied before it was approved, 3) his decisions were constantly questioned, 4) his personal belongings were placed in storage when he was on medical leave, 5) he was denied advance sick leave before it was ultimately approved, and 6) he was placed on AWOL. This conduct was sufficiently severe or pervasive to the point that Petitioner Momah's doctor had to place him on medical leave. The Respondent took no remedial action to stop the harassing behavior even though it had been warned, and had acknowledged the behavior. Such pattern of behavior was sufficient to overcome summary judgment.

Petitioner Momah showed a pattern of discriminatory behavior both prior to and after his complaints with the employer thereby meeting his burden of proof to overcome a motion for summary judgment. *Smith v. St. Louis University*, 109 F.3d 1261 (8th Cir. 1997). A statistical evidence of pattern of discrimination coupled with other evidence is a pretext for an employment discrimination case. *Bell v. Bolger*, 708 F.2d 1312 (1983). The statistical pattern is direct evidence that overcomes the standard for a motion for summary judgment. *See Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011(8th Cir., 1999). As detailed above, the consistent pattern of behavior and the respondent's failure to investigate any claims, were substantial to overcome summary judgment. However, the lower courts failed to apply the proper analysis.

With respect to other issues, such as the non selection in the Detroit District Office and promotions,

the district court and the Sixth Court ignored this court's guidelines and standard noted previously, and made a finding of facts and weighed the evidence in light most favorable to the respondent, and then concluded that Petitioner Momah was not selected because of the Respondent's **substantial legitimate reasons,** but ignored the selection of Mr. Dushman, white, and Ms. Barno, white, who had a documented work related performance issues. {See Pet. App. E, p. 39a}. The lower courts further assessed credibility of the witnesses and evidence and concluded implicitly that Mr. Soto's comments "Mr. Momah, you are not going to Detroit" was not evidence of discrimination or discriminatory retaliation. {Pet. App. B, p. 7a}.

Regarding the denial of 1998 and 1999 promotions, the district court concluded after its findings of fact and assessment of credibility of the evidence and witnesses, that Petitioner Momah was not a victim of discrimination and retaliatory discrimination in 1998 because as the district court noted: **He was granted a promotion soon after his supervisor recommended him for it.** {See Pet. App. E, p. 45a}. While the Sixth Court concluded that Petitioner Momah was not a victim of discrimination and retaliatory discrimination in 1999 because Petitioner Momah presented "no evidence to rebut the EEOC's evidence that he received his promotion on the first day he became eligible, namely the one-year anniversary of his previous promotion." In making this findings in light most favorable to the Respondent, the Sixth Circuit ignored the Personnel Technician's memo that the Petitioner Momah did not have to wait one full year. {Pet. App. F, p. 47a -48a and G, p. 57a}. Significantly, in weighing the evidence in light most favorable to the Respondent, the Sixth Court ignored the evidence that shows that in1998, Judge Kimmelmen was promoted

even without waiting for one full year. {Pet. App. F, p. 55a}.

In addition, in weighing the evidence and assessing the credibility of the witnesses, the lower courts ignored the evidence which shows that Petitioner Momah's 1998 promotion was due before Judge Kimmelmen's promotion. The lower courts further ignored the evidence which shows that Mr. Grabon and Ms. Wood promoted Judge Kimmelmen before Petitioner Momah, even though Petitioner Momah out produced Judge Kimmelman and significantly contributed to the district's outstanding performance for three years.[13] {Pet. App. F and Pet. App. G, p. 53a-56a}. The lower court further ignored the evidence which shows that Petitioner Momah and Judge Kimmelmen were supervised by Judge Scott. Significantly, at the time Mr. Grabon and Ms. Wood promoted Judge Kimmelmen, Judge Scott was on medical leave. The above named officials told Petitioner Momah to wait for Judge Scott to come back from medical leave to promote him. {Pet. App. F. p. 49a-50a and G, p. 54a}.

Finally, in *Hunt v. Cromartie*, 119 S.ct. 1545 (1999), this court reminded the lower courts again that before granting a summary judgment, they must not weigh evidence and assess credibility of the parties or evidence because that belongs to the jury. In addition, the court noted that "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." Id., at 1551-2. Rather than following this guideline and standard, the lower courts deviated by making findings of facts, assessing credibility of witnesses and evidence and weighing the

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13In dismissing the entire complaint, the district court did not comment on 1999 promotion. Therefore, making it very difficult to ascertain precisely the reason for the dismissal of the claim.

evidence in light most favorable to the government.

The decisions of the lower courts to deviate from the applicable standard and guidelines established by the court, and summarily dismiss all the issues including those that were never investigated are contrary to this court principle of justice that this court has for long advocated. Therefore, the decisions threaten the uniform application of the nations' rule of law.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit and the Unites States District Court for the Eastern District of Michigan Southern Division have placed a high burden of proof upon Petitioner Momah to overcome the minimum requirement to prove discrimination and adverse employment conditions in deviation of applicable case laws as well as against public policy. The Court should grant *certiorari* to review these important matters and prevent proper discrimination cases from being disposed of on summary judgment.

Based on the above reasons, Petitioner Momah prays for this honorable court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A
No. 03-2561

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Davidson Momah,
Plaintiff - Appellant,
v.
Cari M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants - Appellees.

Filed 4/17/06

JUDGES: Before GUY, BATCHELDER, and JOHN R. GIBSON, * Circuit Judges.

Upon consideration of the appellant's motion for leave to file an AMENDED petition for rehearing, is GRANTED.
It is ORDERED that the motion be and it hereby is
It is further ORDERED that the original petition for rehearing the Amend petition for rehearing be and they hereby are DENIED.

Footnotes

* The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

APPENDIX B
No. 03-2561

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Davidson Momah,
Plaintiff - Appellant,
v.
Cari M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants - Appellees.

March 15, 2006, Filed

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COUNSEL: For DAVIDSON MOMAH, Plaintiff - Appellant: Elaine R. Carlis, Sherbow & Mitchell, Pleasant Ridge, MI.

For CARI M. CARI M. DOMINGUEZ, CHAIR, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Defendant - Appellee: Peter A. Caplan, Asst. U.S. Attorney, U.S. Attorney's Office, Detroit, MI.

JUDGES: Before GUY, BATCHELDER, and JOHN R. GIBSON, * Circuit Judges.

OPINION BY: JOHN R. GIBSON

OPINION: JOHN R. GIBSON, Circuit Judge.

Davidson Momah appeals the district court's grant of summary judgment in favor of his employer, the EEOC, on his claims of discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. We affirm.

Davidson Momah, who is black, was born and raised in Nigeria. He came to the United States in 1980 to attend college and later obtained his law degree. In April, 1994, he began working as an investigator in the Detroit, Michigan office of the EEOC. During his three years as an investigator in Detroit, Momah received periodic promotions and favorable evaluations from his supervisors. In early 1997, Momah applied for and was selected to fill a vacant Administrative Judge position in the EEOC's Memphis, Tennessee office.[1] When Momah moved to Memphis his wife and daughter remained in Detroit, but it was his intention that they would join him in Memphis once he found a house for the family. However, in June 1997, Momah was hospitalized after being physically assaulted by a white supremacist at a gas station. Traumatized by the attack on her husband and fearful of further attacks, Momah's wife became unwilling to relocate to the South, and she demanded that he request to be transferred back to

Detroit. Although Momah initially refused, he eventually relented when his daughter began to experience health problems.

While visiting his family over the 1997 Christmas season, Momah met with officials at the Detroit office to discuss the possibility of a hardship transfer to a vacant Administrative Judge position in Detroit. The director of the Detroit office, James Neely, told Momah that although he would like to bring him back, he did not have the authority to do so. However, Neely did explain the process by which Momah could request a transfer through EEOC headquarters in Washington, D.C. On Neely's advice, Momah sent a letter to headquarters requesting a hardship transfer to Detroit. When Ralph Soto at EEOC headquarters received the request, he contacted Walter Grabon, the director of the Memphis office where Momah was then working as an Administrative Judge. Grabon opined to Soto that Momah's request should be denied. By letter dated February 3, 1998, EEOC headquarters notified Momah that it "was unable to grant [the] request for reassignment to the Detroit District Office at this time." The letter, signed by Soto, stated that the denial was "due to the current workload and staffing levels in the Memphis District Office" and that the requested reassignment "would not serve our current operational [*4] needs," although it did inform Momah that headquarters would "be happy to reconsider your transfer request if there is a change in the [Memphis office's] workload and staffing situation."

Around the time of the denial, Momah met with Grabon, who told Momah that he would need him around for at least six months to help reduce the

backlog at the Memphis office before Grabon would support any reassignment request. Momah reluctantly agreed to this arrangement. Approximately six months later, Momah again met with Grabon to discuss the possibility of a hardship transfer. By this time, Momah's daughter had been diagnosed with scoliosis, a condition requiring treatment by specialists in Detroit and Chicago. Momah showed Grabon a letter that he later sent to EEOC headquarters recounting his daughter's medical problems and pleading for urgent action on his transfer request. In the letter Momah stated his willingness to transfer to any position in Detroit, including a temporary assignment as an Administrative Judge or even into his former position as an investigator. Momah also promised to pay his relocation expenses and offered to take, the cases assigned to him for processing in Memphis with him to Detroit if he were permitted to go. Grabon told Momah not to bother making the request because it would not be approved, but that he should contact headquarters directly about the matter. During the conversation Momah informed Grabon that he was aware that a white male Administrative Judge had been granted a hardship transfer from EEOC headquarters to the Little Rock office of the EEOC in order for him to be closer to his adopted son. Grabon told Momah not to believe rumors about transfers of other EEOC employees.

Sometime after Momah submitted the transfer request to headquarters, Neely convened a meeting at the Detroit office to discuss Momah's request. In attendance were Andrew Sheppard, deputy director of the Detroit office and Gail Cober, enforcement manager in Detroit. Sheppard, a black male, told Neely that he had no problem with Momah's returning to Detroit, but

Cober, a white female, objected. Momah claims that following this meeting, Cober and Administrative Judge Mimi Gendreau, another white female in the Detroit office, began mounting pressure on Neely to convince headquarters to deny Momah's transfer request. Like Cober, Gendreau objected to Momah's return and [*6] voiced her objections to Sheppard and Neely, even going so far as to tell Sheppard that she would rather resign than ever work with Momah again.

While his request was pending in August 1998, Momah flew to EEOC headquarters to meet with Soto in person to discuss the possibility of a transfer. Momah relayed his daughter's health condition, his willingness to accept any assignment in the Detroit office including a temporary detail or. an investigator position, and his willingness to bear his own relocation expenses. However, Soto told Momah that Detroit did not need any additional staff due to low inventory. Following the meeting with Soto, Momah went to the office of Elizabeth Thornton, one of Soto's superiors, to discuss his situation. After listening to his concerns, Thornton told Momah that the low inventory in Detroit made a transfer there impossible. She suggested that Momah consider a transfer to the Indianapolis office, since it was closer to Detroit than Memphis, just to keep his options open.

In a letter dated September 8, 1998, Momah's second request for a hardship transfer was formally denied. The letter, signed by Soto, stated that a transfer as either an Administrative Judge or as an investigator in the Detroit office would "not be possible ... at this time." It indicated that Momah's request had been discussed with Neely, who had determined that "a reassignment

[to the Detroit office] is not commensurate with the district's needs." According to Soto, he had asked one of his subordinates, Marilyn Hayes, to contact Neely regarding Momah's request. According to Hayes, Neely told her that "the Detroit office did not want [Momah] back" and "he was not welcome back" because "they had had problems with him when he had been there." After learning that his request had been denied, Momah contacted Neely directly. Neely admitted to Momah that headquarters had contacted him about Detroit's inventory, but that the ultimate decision of whether to grant or deny his transfer request was made out of headquarters. In October, Momah met with Neely personally at the Detroit office, and Neely again told Momah that he was not responsible for the denial and that all he did was inform headquarters about inventory levels at the Detroit office. Later in October, Momah contacted Soto and asked if he would reconsider the denial. Soto told him, "Mr. Momah, you are not going to Detroit." In November, Momah met with Grabon, who denied any role in the denial and told Momah to take up the issue with Neely and headquarters. In the ensuing months Momah had a number of conversations with Grabon about his desire to transfer to Detroit during which he informed Grabon that he believed "what they were doing to [him] was discriminatory."

In September 1999, approximately one year after Momah's second request for a hardship transfer had been denied, Momah learned that a white investigator, Daniel Dushman, had been granted a hardship transfer to the Detroit office. Dushman was an investigator in the Detroit office during the time Momah had worked there. In early 1999, Dushman had requested and was

granted a hardship transfer from Detroit to the EEOC office in Alberquerque, New Mexico. Less than seven months later, Dushman wrote to Thornton at EEOC headquarters requesting a hardship transfer back to Detroit on account of family problems. Despite his being demoted while working as an investigator in Detroit and his acknowledged performance problems at the Alberquerque office, Dushman's transfer request was approved. After learning of Dushman's transfer, Momah contacted [*9] numerous EEOC officials in late September and early October 1999 to renew his request for a transfer. He contacted Jacqueline Bradley, the director of field management programs, and Marilyn Hayes, both at EEOC headquarters, to determine the status of any vacancies in the Detroit office, as well as the current inventory levels there. He made similar inquiries of Neely in the Detroit office. According to Momah, the officials informed him that the situation had not changed since his initial request and that his request continued to be denied.

On or about October 13, 1999, Momah initiated contact with an EEO counselor, claiming that the denials of his transfer requests were discriminatory. After the informal process failed, Momah filed a formal complaint with the EEO on November 24, 1999, claiming that his repeated requests for a transfer had been denied on account of his race, color, national origin, gender, and disability, and in retaliation for his exercise of rights protected under Title VII. Momah's complaint also alleged that the EEOC, for discriminatory and/or retaliatory reasons: (1) revoked, in September 1998, an offer to transfer him to an Administrative Judge position in Indianapolis; (2) in November 1998 rated his performance as "proficient" instead of "outstanding"; (3)

delayed his promotion from GS 13 to GS 14 from December 1999 to January 2000; and (4) delayed his promotion from GS 12 to GS 13 from December 1998 to February 1999. The EEO notified Momah by letter dated May 26, 2000 that the agency was not accepting for investigation claims (1), (2) and (4) for failure to initiate contact with an EEO counselor within forty-five days after they occurred. However, the EEO accepted for investigation his claims regarding the denial of his transfer requests and the delay of his most recent promotion and informed him that his denial of transfer claim was being treated as a continuing violation.

During the course of the EEO investigation, Momah learned that the EEOC had granted several requests from white females to transfer while his requests were still pending. Deborah Barno, a trial attorney in the Detroit office, was assigned temporarily to the vacant Administrative Judge position in Detroit. During the time that Momah's transfer request was pending, Judith Fournalik requested and was granted a hardship transfer from the New York EEOC office to an investigator position in the Detroit office in order for her to be closer to the law school in Ohio she was then attending. In addition, Linda Stankovich was allowed to return to the Detroit office to a different position than the one she had previously held, and Tina Hoffman, who had earlier resigned her position as budget analyst in the Detroit office, was allowed to return on a contract basis.

In April 2000, the EEOC offered Momah a transfer to an Administrative Judge position in the Indianapolis office of the EEOC in order for him to be closer to his family. Momah accepted the transfer and moved to

Indianapolis. He claims that he did so based on representations by EEOC officials that the transfer to Indianapolis was temporary and that he would be transferred to Detroit as soon as a position became available there. Momah was unhappy in Indianapolis, describing his experience there as "a nightmare" due to conflicts with his supervisors over his use of personal time to travel to Detroit to see his family. During his time in Indianapolis, Momah periodically renewed his request for a transfer to Detroit. He sent a letter dated May 25, 2000 to Elizabeth Thornton at EEOC headquarters requesting a hardship transfer from Indianapolis to Detroit. On June 9, 2000 Momah, accompanied by his attorney, traveled to EEOC headquarters to discuss his request with Jaqueline Bradley. While acknowledging the difficulty of Momah's personal situation, Bradley told Momah that a transfer to Detroit would not be possible due to budgetary constraints and the lack of a vacancy in the Detroit office. Momah's attorney inquired as to the likelihood of a transfer to the Cleveland office or back to Memphis, but Bradley rejected both requests: the former on the basis that the Cleveland office was overstaffed, the latter due to budgetary reasons. By letter dated June 27, 2000. Elizabeth Thornton informed Momah that his request for a hardship transfer from Indianapolis to Detroit was denied on the grounds that there were no funded vacancies in the Detroit office. By letter of July 14, 2000 to Thornton, Momah requested that she reconsider the earlier denial, and by letter dated August 20, 2000, he again requested a hardship transfer. Thornton responded by letter dated August 24, 2000 that the situation had not changed and that there continued to be no vacancies in the Detroit office.

Momah took a medical leave of absence for depression and work-related stress in approximately September 2000; he returned to work as an Administrative Judge at the Indianapolis office on April 9, 2001. Shortly after his return, the EEOC received funding to permanently fill the Administrative Judge position in Detroit to which Debra Barno had been assigned on a temporary basis. Momah applied for the position and was considered along with the other applicants. However, he was not selected; instead, Neely selected Debra Barno for the Administrative Judge position. In October of 2001, Momah was granted a transfer from the Indianapolis office back to the Memphis office as an Administrative Judge. However, after accepting the transfer, a disagreement erupted between Momah and EEOC headquarters over who would bear the costs of relocation and when Momah was expected to report for duty. Shortly after this disagreement, Momah notified headquarters that he was rejecting the transfer to Memphis, stating that "it is in my best interest to remain in the Indianapolis District Office until all the issues raised in my complaints are resolved either by an impartial official within the [EEOC] or before the federal court."

Following the investigation into Momah's complaint, n1 the EEOC issued its Final Action on June 4, 2002. It affirmed the EEO's refusal to investigate Momah's untimely claims, but went on to address the merits of his claims that (1) since January 1998 he has been denied a hardship transfer to Detroit and that (2) his promotion was delayed, all on account of his race, color, national origin, gender, disability, and in retaliation for his engaging in activity protected under Title VII. With respect to his disability discrimination claim, the EEOC

concluded that Momah had failed to establish that he was a qualified individual with a disability. With respect to his retaliation claim, the EEOC concluded that he failed to make out a prima facie case because he presented no evidence that those involved with his transfer or promotion were aware that he had engaged in any protected activity. The EEOC concluded that Momah had failed to establish a prima facie case of discrimination on account of race, color, or national origin on his denial of transfer and delay of promotion claims because he failed to present evidence that employees not in a protected class were treated more favorably than he. On his delay of promotion claim, the EEOC concluded that Momah had also failed to make out a prima facie case because he failed to show that he suffered an adverse employment action in that he received his promotion on the first day he was eligible. With respect to his denial of transfer claim, the EEOC concluded that, even if Momah could make out a prima facie case of discrimination, he failed to present evidence that the agency's reason for denying his transfer--namely that there were no available positions in Detroit--was a pretext for discrimination.

Momah filed the present complaint against the EEOC in federal court on August 30, 2002, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000, et seq.; the Rehabilitation Act of 1973, 29 U.S.C. § 791; 42 U.S.C. § 1983; the Westfall Act, 28 U.S.C. § 2679(b)(1); the Federal Tort Claims Act, 28 U.S.C. § 2673; unspecified "EEOC Rules and Regulations"; Washington D.C. Civil Rights Law; as well as breach of contract claims under Michigan and Washington D.C. common law. The EEOC filed a motion to dismiss, [*16] which the district court denied as to the Title

VII and Rehabilitation Act claims, but granted as to the remaining claims. Following discovery, the EEOC moved for summary judgment. The district court issued a bench opinion following a hearing and a written order the following day granting the EEOC's motion for summary judgment in its entirety. This appeal followed.

We review the district court's grant of summary judgment de novo. Johnson v. Kroger Co., 319 F.3d 858, 864 (6th Cir. 2003). In reviewing summary judgment, we look at the record in the same fashion as the district court, Guarino v. Brookfield Twp. Trustees, 980 F.2d 399, 403 (6th Cir. 1992), and our review "is limited to the evidence before the district court when it ruled." Campbell v. Potash Corp. of Sask., Inc., 238 F.3d 792, 797 (6th Cir. 2001). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We view all evidence before us in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A genuine issue of fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once the movant has pointed to evidence in the record showing that there are no genuine issues of material fact, the non-moving party must respond setting forth specific facts showing there is a genuine

issue for trial. Guarino, 980 F.2d at 405 (quoting Rule 56(e)).

The EEOC argues and the district court concluded that Momah's failure to initiate timely contact with an EEO counselor bars his claim that the EEOC discriminated against him by denying his requests for a hardship transfer. A federal employee suing under Title VII must satisfy "rigorous administrative exhaustion requirements and time limitations." McFarland v. Henderson, 307 F.3d 402, 406 (6th Cir. 2002) (quoting Brown v. General Serv. Administration, 425 U.S. 820, 833, 96 S. Ct. 1961, 48 L. Ed. 2d 402 (1976)). Relevant here is the requirement that an "aggrieved [federal employee] must initiate contact with an [EEO] Counselor within 45 days of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1). Timely contact; with an EEO counselor is an administrative prerequisite to filing an employment discrimination claim in federal court. Horton v. Potter, 369 F.3d 906, 910 (6th Cir. 2004); McFarland, 307 F.3d at 406.

We conclude that even if Momah failed to initiate timely contact with an EEO counselor, the EEOC waived its untimeliness defense by addressing the merits of his denial of transfer claim at the administrative level without raising a timeliness objection. In a recent Title VII case by a federal employee, we held that "when an agency accepts and investigates a complaint of discrimination ... it does not thereby waive a defense that the complaint was untimely." Horton, 369 F.3d at 911 (citing Belgrave v. Pena, 254 F.3d 384, 387 (2d Cir. 2001); see also Ester v. Principi, 250 F.3d 1068, 1072 n.1

(7th Cir. 2001); [*19] Bowden v. United States, 323 U.S. App. D.C. 164, 106 F.3d 433, 438 (D.C. Cir. 1997); Rowe v. Sullivan, 967 F.2d 186, 191 (5th Cir. 1992); Boyd v. United States Postal Serv., 752 F.2d 410, 414 (9th Cir. 1985)). However, we recognized that waiver would occur "when the agency decides the complaint on the merits without addressing the untimeliness defense." Id. (citing Ester, 250 F.3d at 1071-72; Bowden, 106 F.3d at 438). Here, although the EEO addressed the untimeliness defense with respect to three of the five claims in Momah's formal complaint, it decided the merits of Momah's denial of transfer claim. Later, in its Final Action, the agency affirmed the untimeliness determinations as to three of the five claims, but again decided Momah's denial of transfer claim on the merits. It was only in support of its motion to dismiss Momah's federal complaint that the EEOC asserted that the denial of transfer claim was untimely. In these circumstances we conclude that the agency waived any timeliness objection, and therefore Momah's denial of transfer claim is properly before us. See Horton, 369 F.3d at 911; [*20] see also Ester, 250 F.3d at 1071-73 (discussing "strong policy considerations" underlying the rule that agency waives untimeliness defense by failing to address it at administrative level).

Title VII makes it unlawful for an employer "to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). A Title VII plaintiff may establish discrimination either by introducing direct evidence of discrimination or circumstantial evidence supporting an inference of discrimination.

Johnson, 319 F.3d at 864-65. Momah argues that he has presented direct evidence that his requests for a hardship transfer were denied for discriminatory reasons. "Direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." Id. at 865 (quoting Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir.1999)). Unlike circumstantial evidence, it "does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice-against members of the protected group." Id. Direct evidence of discrimination "must establish not only that the plaintiff's employer was predisposed to discriminate . . . , but also that the employer acted on that predisposition." DiCarlo v. Potter, 358 F.3d 408, 415 (6th Cir. 2004) (quotation omitted).

Momah's purported direct evidence of discrimination consists of comments by Gail Cober and Mimi Gendreau regarding his African accent and his poor command of the English language. Viewing the evidence in the light most favorable to Momah, a jury could possibly conclude that Cober and Gendreau's comments were discriminatory. Nonetheless, Momah's contention that these comments constitute direct evidence of discrimination fails because neither Gober nor Gendreau were responsible for the allegedly discriminatory employment action--the denial of his transfer requests. Carter v. Univ. of Toledo, 349 F.3d 269, 273 (6th Cir. 2003) ("Comments made by individuals who are not involved in the decision-making process regarding the plaintiffs employment do not constitute direct evidence of discrimination."); Hopson

v. DaimlerChrysler Corp., 306 F.3d 427, 433 (6th Cir. 2002) (comments by manager lacking involvement in the decision-making process do not constitute direct evidence); Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 354-55 (6th Cir. 1998) ("An isolated discriminatory remark made by one with no managerial authority over the challenged personnel decisions is not considered indicative of age discrimination"). Momah responds that even if Cober and Gendreau did not have ultimate authority over his transfer requests, their vocal opposition to his return to Detroit so influenced Neely as to render them the de facto decisionmakers. However, this contention fails in two respects. First, the undisputed evidence demonstrates that although Neely had significant input into the decisionmaking process, the ultimate decision of whether to grant Momah's request was made out of EEOC headquarters in Washington D.C. Second, even if we were to assume that Neely's input was outcome-determinative, there is no evidence that Neely's input was affected by pressure from Cober and Gendreau, instead of simply reflecting his own views about the Detroit office's personnel needs. Because Momah has failed to present evidence that Cober and Gendreau were responsible for headquarters' denial of his transfer requests, their comments, no matter how insensitive, cannot constitute direct evidence that his requests were denied for discriminatory reasons.

Because Momah has failed to present direct evidence of discrimination, he must proceed under the burden-shifting approach first set out in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and later refined by Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.

Ed. 2d 207 (1981). Johnson, 319 F.3d at 865. Under this framework, the Title VII plaintiff must carry the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. DiCarlo, 358 F.3d at 414. The prima facie case creates a rebuttable presumption of discrimination requiring the defendant to articulate a legitimate, nondiscriminatory reason for the challenged action. Id. If the defendant meets this burden, the plaintiff must prove that the proffered reason was a pretext for unlawful discrimination. Id.

To establish a prima facie case under Title VII, Momah must demonstrate that (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) he was treated differently than similarly-situated, non-protected employees. DiCarlo, 358 F.3d at 415 (6th Cir. 2004) (quotation omitted). Undisputed evidence demonstrates that Momah is a member of several classes protected by Title VII: he is a black (race) male (gender) from Nigeria (national origin).2 Likewise, Momah produced evidence that he was qualified for both the Administrative Judge and investigator positions in Detroit to which he repeatedly requested transfer. Moreover, there is evidence from which.a jury could conclude that non-protected, but similarly-situated, employees were treated more favorably than Momah. n3

Although Momah has established three elements of his prima facie case, he has not demonstrated that the denials of his requests for a purely lateral transfer were "adverse employment actions" actionable under Title VII. We have previously held that an "adverse

employment action" is one that results in a "materially adverse change in the terms and conditions of [plaintiffs] employment." Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999); Kocsis, 97 F.3d at 886. A "materially adverse" change in the terms or conditions of employment is typically characterized "by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." Hollins., 188 F.3d at 662. Under this definition, it would appear that a purely lateral transfer or denial of the same, which by definition results in no decrease in title, pay or benefits, is not an adverse employment action. See Kocsis, 97 F.3d at 886, a conclusion consistent with the authority from our sister circuits. See, e.g., Williams v. R.H. Donnelley, Corp., 368 F.3d 123, 128 (2d Cir. 2004); O'Neal v. City of Chicago, 392 F.3d 909, 913 (7th Cir. 2004); Amro v. Boeing Co., 232 F.3d 790, 797-98 (10th Cir. 2000); LePique v. Hove, 217 F.3d 1012, 1014 (8th Cir. 2000); Brown v. Brody, 339 U.S. App. D.C. 233, 199 F.3d 446, 455-56 (D.C. Cir. 1999); Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999); Burger v. Cent. Apartment Mgmt, 168 F.3d 875, 879 (5th Cir. 1999); Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1448 (11th Cir. 1998). n4

Momah presents no evidence that he suffered a loss of pay, benefits, or title, or any alteration in his job responsibilities as a result of being denied a transfer to Detroit; instead he contends that the denial was adverse because it denied him the opportunity to be closer to his family. His argument raises the issue of whether the adversity of a given employment action should be judged based on an objective or subjective standard. We have previously held that an "employee's

subjective impressions as to the desirability of one position over another are not relevant" in determining whether the employee suffered an adverse employment action. Policastro v. Northwest Airlines, Inc., 297 F.3d 535, 539 (6th Cir. 2002); see also Strouss v. Mich. Dep't of Corr., 250 F.3d 336, 343 n.2 (6th Cir.2001) (explaining that "purely personal reasons for turning down a transfer are not sufficient to render a transfer an adverse employment action"); Reese v. State of Mich. Family Independence Agency, 31 Fed.App'x 172, 174 (6th Cir. 2002) (relying on Strouss to hold that "purely personal reasons for requesting a transfer are not sufficient to render its denial an adverse employment action."). Instead, we employ an objective test that considers whether the employment action at issue was "objectively intolerable to a reasonable person." Policastro, 297 F.3d at 539 (citing Kocsis, 97 F.3d at 886); Strouss, 250 F.3d at 342; see also Keeton v. Flying J. Inc., 429 F.3d 259, 264-66 (6th Cir. 2005) (applying objective test to determine whether lateral geographic transfer constituted adverse employment action). Our circuit's focus on objective indicia of adversity is consistent with the holdings of our sister circuits that an employee's subjective preference for one position over another is insufficient to render the denial of a purely lateral transfer an adverse employment action under Title VII. See, e.g., O'Neal, 392 F.3d at 913 (holding that a "purely subjective preference for one position over another" does not "justify trundling out the heavy artillery of federal antidiscrimination law" in a Title VII claim for the denial of a lateral transfer where "the two jobs were equivalent other than in idiosyncratic terms") (quotation and citation ommited); Williams, 368 F.3d at 128 (rejecting employee's denial of transfer claim on grounds that employee's desire to

return to Las Vegas where she still maintained a home was merely a "subjective, personal disappointment[]" insufficient to "meet the objective indicia of an adverse employment action"); Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532-33 n.6 (10th Cir. 1998) ("If a transfer is truly lateral and involves no significant changes in an employee's conditions of employment, the fact that the employee views the transfer either positively or negatively does not of itself render the denial or receipt of the transfer [an] adverse employment action").

Applying these principles to Momah's claim, we conclude that he has failed to produce evidence from which a jury could conclude that the denial of his request to be transferred to either an investigator or Administrative Judge position in the Detroit office would be adverse to a reasonable person. First, the record demonstrates that a transfer from Momah's position as an Administrative Judge in Memphis to the investigator position in Detroit would have constituted a demotion within the EEOC, which would lead a reasonable jury to conclude that Momah had suffered an adverse employment action if his request for a demotion had been granted. See, e.g., Williams, 368 F.3d at 128 ("Clearly, an employer's denial of a transfer request that would have resulted in a reduction in pay and the employee's demotion within the organization, without more, does not constitute an adverse employment action."). Second, Momah presents no evidence that the Administrative Judge position in Detroit differed in any way, save for proximity to his family, from the identical position he held as an Administrative Judge in Memphis, and thus fails to provide evidence from which a jury could conclude that the Memphis position was objectively worse than the

identical position in Detroit. Because Momah has not shown that he suffered an adverse employment action, he fails to establish a prima facie case. n5

Momah argues that the district court "abused its discretion by completely ignoring all of [his] evidence in support of his retaliation claims." Title VII prohibits retaliation by an employer where an individual has engaged in protected activity. 42 U.S.C. § 2000e-3(a). A plaintiff can establish retaliation under Title VII without direct evidence under the burden-shifting approach set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See, e.g., DiCarlo, 358 F.3d at 420. Under this standard, Momah must first establish a prima facie case of retaliation by showing that (1) he engaged in an activity protected by Title VII; (2) the defendant knew of the exercise of his rights; (3) the defendant took an employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. Id. If Momah can establish a prima facie case, the burden of coming forward with a legitimate, non-discriminatory reason for the adverse employment action falls upon the EEOC. Id. (quotation omitted). However, if the EEOC articulates a non-discriminatory reason, it is then Momah's burden to show that the EEOC's reasons are merely a pretext for retaliation. Id.

Momah points to four actions allegedly undertaken by the EEOC to retaliate against him for filing an EEO complaint: (1) delaying one of his promotions; (2) negatively rating his performance; (3) refusing to process his subsequent EEO complaints; and (4) failing to grant his transfer requests. He fails to make out a

prima facie case for any of these claims. First, with respect to the delay of promotion claim, Momah presents no evidence to rebut the EEOC's evidence that he received his promotion on the first day he became eligible, namely the one-year anniversary of his previous promotion. Second, with respect to the performance rating claim, the undisputed evidence demonstrates that Momah never received a negative performance rating; he consistently received mid-range performance ratings, which are not actionable adverse employment actions under Title VII. See Hollins., 188 F.3d at 662. Third, there is no separate cause of action for his claim regarding the EEOC's alleged failure to process his complaint, see, e.g., Jordan v. Summers, 205 F.3d 337, 342 (7th Cir. 2000) (holding plaintiff's claim that agency "botched the processing of her [EEO] complaint . . . does not state a claim upon which relief can be granted"); rather, if Momah was dissatisfied with the agency's handling of a complaint his remedy was to do precisely what he did here: proceed to federal court. Id. Lastly, with respect to his claim that the EEOC retaliated against him by failing to grant his transfer requests, as discussed above, the denial of a purely lateral transfer without more is insufficient to constitute an "adverse employment action" under Title VII. See Kocsis, 97 F.3d at 886.

The judgment of the district court is affirmed.

---------- Footnotes ----------

* The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

n1 An EEOC Administrative Judge hears and decides, at the administrative level, complaints brought by federal employees alleging unlawful discrimination by their employers.

Momah argued to the district court that he was discriminated against on account of disability in violation of the Rehabilitation Act. However, he does not raise this issue on appeal, and so has abandoned it. See Kocsis v. Multi-Care Mgmt. Inc., 97 F.3d 876, 881 (6th Cir.1996).

n3 The record demonstrates that: (1) Dan Dushman, a white male, was granted a hardship transfer to an investigator position in Detroit; (2) Deborah Barno, a white female, was assigned temporarily to the vacant Administrative Judge position in Detroit; (3) Judith Fournalik, a white female, was granted a hardship transfer to an investigator position in the Detroit office; (4) Linda Stankovich, a white female, was allowed to return to the Detroit office to a different position than the one she had previously held; and (5) Tina Hoffman, a white female, was allowed to return to the Detroit office on a contract basis after earlier having resigned. See Ercegovich, 154 F.3d at 352 (holding that comparables need not be identical; rather, they need only be similarly situated "in all of the relevant aspects").

n4 Momah urges us to reject this uniform authority based on the First Circuit's remark in Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997), refusing to "accept the . . . view that a refusal to transfer is automatically outside Title VII." We decline to do so.

n5 The Supreme Court's grant of certiorari to this

circuit's en banc decision in White v. Burlington Northern & Santa Fe R. Co., 364 F.3d 789 (6th Cir. 2004), to resolve a split among the circuits as to the scope of an adverse employment action in the context of a Title VII retaliation claim, see Burlington Northern & Santa Fe R. Co. v. White, 126 S. Ct. 797, 163 L. Ed. 2d 626, 2005 WL 3272153, 74 U.S.L. W. 3130 (2005), does not call for a different result here, as the job transfer at issue there was not a purely lateral transfer, it was a demotion; the position from which the employee was transferred was "objectively considered a better job." White, 364 F.3d 789, 803-804.

APPENDIX C
Filed:
32-73504
UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Davidson Momah,
Plaintiff,
v.
Carì M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION

On September 11, 2003, Defendant filed a motion for summary judgment. On October 24, 2003, after hearing oral arguments, this Court granted Defendant's motion for summary judgment. An order to this effect was entered by the Court on October 30, 2003. On November 7, 2003, Plaintiff filed the motion for reconsideration which is now before the Court.

The issues before the Court on this motion are whether Plaintiff made a showing: (i) of a reason justifying relief from this Court's judgment, and (ii) of a palpable defect by which the court was misled, and that correction of the defect will result in a different disposition of the case, Sec E.D. Mich. L.R. 7.1(8)(3); FRCP 60.

Pursuant to Federal Rule of Civil Procedure 60, on motion and upon such terms as arc just, the court

may relieve a party or a party's legal representative from a final judgment, order or proceeding for: (i) mistake, inadvertence, surprise or excusable neglect, (ii) newly discovered evidence, (iii) fraud, (iv) the judgment is void, (v) the judgment has been satisfied or (vi) any other reason justifying relief." See FRCP 60. Pursuant to Local Rule 7.1(8)(3), "[g]enerally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case." E.D. Mich. L.R. 7.1(g)(2)-(3).

Plaintiff clearly raises arguments which were previously considered and ruled upon by this Court. Accordingly, Plaintiff has failed to show a reason justifying relief from operation of the judgment or a palpable defect by which the court was misled. See FRCP 60; E.D. Mich. L.R. 7.1 (g)(3).

Therefore, Plaintiff s motion pursuant to Rule 7.1(g) of the Local Rules asking the Court to reconsider its Order granting Defendant's motion for summary judgment is hereby DENIED.

IT IS SO ORDERED.

APPENDIX D

Filed:

32-73544

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Davidson Momah,
Plaintiff,
v.
Cari M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

IT IS HEREBY ORDERED THAT defendant's Motion for Summary Judgment is GRANTED, for the reasons that were stated on the record on October 20, 2003.

APPENDIX E
10/29/2003
32-73504
UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Davidson Momah,
Plaintiff,
v.
Cari M. Dominguez, Chair, United States Equal Employment Opportunity Commission; Equal Employment Opportunity Commission,
Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

***

THE COURT: All right. Defendants' motion is this?
MR. CAPLAN: Defendants.
THE COURT: How are you? I haven't seen you in a long time.
MR. CAPLAN: Good morning. I'm well, Your Honor. It's good to see you. This is defendants' motion for summary judgment on a -
COURT REPORTER: Your name, please? I'm sorry.
MR. CAPLAN: Peter Caplan for the United States. Well, I guess it's for the Chair of the U.S. EEOC, the nominal defendant in this case.
THE COURT: Wait a minute. Are you all prepared to go forward?
MR. IBE: Yes. Good morning, Your Honor. Rickie Emmanuel The and Elaine Carlis.
MS. CARLIS: I'm Elaine Carlis, Your Honor, on behalf of the plaintiff.
Your Honor, there was just one matter that we could

raise before the defendant starts his motion.

THE COURT: What is it?

MS. CARLIS: We have a motion in limine which may address some of the evidence that the defendant seeks to introduce in support of this motion.

THE COURT: Well, anything that is not an undisputed fact, of course, he couldn't rely on at any rate for his motion. I must -- I haven't seen a motion in limine, but it is not an appropriate one to consider at this time at any rate.

MS. CARLIS: Thank you, Your Honor.

THE COURT: Tell me if there are facts that are disputed that he's relying upon

MR. CAPLAN: The Court has no doubt been is aware of the fact that rather ample documents and briefing have been furnished to it, and therefore, I am not going to restate the whole ball of wax. I'm just going to try and highlight a couple of the major issues that I think are dispositive in this matter, Your Honor.

As I expect you are aware, Mr. Momah is an administrative judge with the EEOC. And the core of his complaint is as follows. He was an administrative judge in the Memphis office and he wanted to come to Detroit and that request was not approved.

By way of very brief background, Mr. Momah came to the EEOC from a job in, I believe it was Virginia. He left his family there, a daughter and a wife. They followed him to Detroit after a while. believe he started with the EEOC in Detroit in '94. He was an investigator. Sometime in 1997 he applied for a position as an administrative judge, a promotion from the investigator position.

The administrative judge position to which he applied was in Memphis. He was selected. He moved to Memphis. He left his wife and daughter back here in

Detroit again. The plan apparently was that the wife and daughter eventually would follow him to Memphis. That plan did not eventuate.

According to Mr. Momah, he had a very disturbing experience in Memphis where was attacked by what he describes as a white supremacist, I believe at a gasoline station in Memphis. In the meantime, his wife got cold feet about moving to Memphis. She decided she didn't want to move to Memphis and the daughter had some sort of physical problems, a broken ankle and scoliosis or curvature of the spine.

That being so, he decided he wanted to come back to Detroit. He asked for a reassignment, what he calls a hardship transfer back to Detroit in 1998, I think less than a year after his transfer to -- or hiring in Memphis. That request was denied. There is no question it was denied. It was denied by letter February 3, 1998. It was crystal clear that his request to come back to Detroit was denied.

Now, the reason it was denied, among other reasons, was because there was no position for him here. Yes, there was an authorized position in Detroit of an administrative judge, but it was not funded. The way the government works when someone leaves a position, that doesn't mean an agency automatically gets to refill it. Washington has to approve it and fund it and that position was not funded. There was no position for him to come back to in Detroit.

He made another request to come back to Detroit. He broadened his request a little in the summer of '98, said I'll come either to administrative judge position or a -- or back to an investigator position. That transfer request again was denied. There's no question it was denied by letter of September 8, 1998.

Now, through deposition testimony and

discovery, we have learned that the transfer or the request to the administrative judge position was denied for the same reason it was denied six months earlier, there was no position funded here for an administrative judge. They had one judge here. That was the only one who was funded to act.

As for the investigator position, the director here, a black individual named James Neeley, frankly said, "I don't want him back. He caused me nothing but trouble when he was here. I don't want him back to an investigator position."

So as of September of '98, Mr. Momah had to have known that his requests to come to back to Detroit were denied. However, he first contacts an EEO counselor in October of '99, over a year later, and herein lies the primary argument that I wish to address here today, and that is, that the case is untimely. As the Court no doubt knows, in the federal sector, an alleged discriminatee, an employee who believes he's been the victim of discrimination prohibited by Title 7 or any one of a number of the other anti-discrimination statutes, must initiate contact with an EEO counselor within 45 days of the act about which he complains. He just didn't do it here. He did not complain to an EEO counselor within 45 days. He did not complain to an EEO counselor within a year. He complained to an EEO counselor 13 months later.

And the case law is quite clear that if a federal employee fails to timely initiate the EEO process administratively then a subsequent Title 7 case brought in federal court is subject to dismissal on timeliness grounds.

Now, the plaintiff has a couple of arguments that I'd like to briefly address. We cite the most recent Supreme Court decision on timeliness of administrative

complaints in the Title 7 context, Morgan v. National Railroad Passenger Corp, which as you and I know, is AMTRAK v. Morgan. And the Court made it crystal clear that once a discriminatory act occurs, the time clock starts running.

Now, plaintiff has some rather involved and dictionary-laden arguments for why Morgan doesn't apply. I think plaintiff's argument holds no water. The question of whether an event or an action or whatever the other terms are, the matter alleged to be discriminatory, whatever term it is, it's crystal clear that you've got 45 days from when the act occurs, regardless of how the regulation characterizes that action.

More importantly, plaintiff has no cases to support him on that argument. And defendant has cases to support her, that is, that Morgan applies to the federal sector. But even if there is no Morgan, and I suggest Morgan does apply, and I suggest that Morgan casts serious doubt on plaintiff's other argument that this is somehow a continuing violation, notwithstanding the fact that we have specific discrete acts in February of '98 and September of '98, but even if there is no Morgan, call it what you will, he had 45 days from the time of the actions and he didn't contact an EEO counselor.

Finally, he argues that he didn't know that those were discriminatory acts until a lot later when the light bulb goes on. That simply was not his testimony at deposition. If I could just get an exhibit, among the pile of everything we gave you, was something called -- I think it was Exhibit I, which is a letter that he wrote to the EEOC, a woman named Jacqueline Bradley in November of '99. And he says on the second page of that letter, about three paragraphs down, that in

August of '98, he's referring to, he advised his director, and later a ,man in Washington, that he knew and has heard of several females and white administrative judges and attorneys who were transferred following their personal hardship requests, even though their hardships were less serious compared to mine. And his supervisor, his director told him, don't believe that rumor. So as of August of '98, the light bulb had clearly gone on in his head that this was, in his mind, discrimination.

And his deposition testimony along those lines was consistent, that is, he knew that in August of '98 he was the victim of discrimination. That being so, Your Honor, I hate to use the term an open-and-shut case of untimeliness, and I believe the case should be dismissed on those grounds.

Now, there were numerous other claims at least set forth in the complaint about other acts of discrimination; an office he got didn't have an window in it, an office wasn't ready for him when he got to Memphis, an in-step increase was delayed a matter of weeks. But I don't see in his response any response to our arguments that those were clearly not acts of discrimination, that there is no genuine issue of material fact on those grounds. I don't see any argument contrary to ours.

So all we have is the timeliness issue that I wish to address the Court with. Mr. Momah has submitted an affidavit indicating that he has some 50 witnesses or so that he could call to trial that somehow are going to support his claim of discrimination. I don't think that the Court needs to have a trial in this case.

Now, unless the Court has any specific questions on anything I've said or anything else that's raised in the papers, I'll let Mr. Ibe speak.

THE COURT: All right. Thank you. You'll have rebuttal.

MR. CAPLAN: Thank you, Your Honor.

THE COURT: Defense?

MR. IBE: Good morning, Your Honor.

THE COURT: Good morning.

MR. IBE: May it please the Court, it's a pleasure to be up here before the Court once again, Your Honor.

Your Honor, I think counsel for the government has eloquently articulated their position, and similarly towards counsel for the government side, reference in the briefs and exhibits that were filed before the Court. I will not overburden the Court with information that is contained in the brief itself, the exhibits.

However, I will address the key issue here. Clearly, Your Honor, there is a question of fact in this matter that is at dispute. And Counsel for the government, as eloquently as he had tried to shade the truth before this Court, you cannot really hide from what the truth is.

Yes, Judge Momah is an administrative law judge. Yes, Judge Momah was in Detroit as an investigator prior to going to Memphis. And yes, Judge Momah did request a hardship transfer back to Detroit. Counsel for the government obviously says -did not articulate well regarding the basis for that hardship transfer. Judge Momah's daughter was diagnosed with a serious spinal condition that could have resulted in some kind of paralysis while she was in Detroit.

He was in Memphis. Absolutely no way in the world he could care for his child from Memphis. The kid's doctor is here in Detroit. In fact, I go one step further. The doctor's in Detroit have recommended another physician or another hospital in Chicago for the child to be taken. And Judge Momah, as a caring father,

commuted from Memphis to Detroit to Chicago back to Memphis just to care for his child. All of these conditions and all of these problems were made aware to his employer. The employer knew this. But employer merely turned the opposite eye. They did not care.

The hardship transfer that was requested here is nothing unusual, Your Honor. Within the EEOC, it is something that is normally done, but it has become a privilege of employment. There are so many instances of parties who were transferred back to Detroit who were similarly situated to Judge Momah. A good example is Mr. Dan Dushman, someone that obviously the defense has failed to raise before the Court.

They claim that Mr. Momah was a troublemaker, that he had misconduct problems. However, Your Honor, those were not reasons he was denied a hardship transfer. There is evidence that has been filed with the Court along with tape recordings, Your Honor, that contradict everything that the defense has said before this Court. And just to make a note here now for the record, the tape recordings of these individuals, these officials have been made available to the defense counsel, but have refused, or failed to copy them or listen to those tape recordings, Your Honor, and we have those in the Court today as well. This just clearly tells us that these parties lied and they have lied, including in all of the affidavits they have submitted before the Court, because their, voice will clearly state what their true intent was, how they told Judge Momah he will never go back to Detroit.

Judge Momah could not, Your Honor, have known that he was being discriminated against until somewhere around September of 1999. He had continuously followed advice of senior government officials such as James Miller, Mr. Grabon, Mr. Soto.

They're telling him, you do this and you do that. He continuously did those things in order to see if he could get a transfer.

At some point, based on an exhibit that counsel for the government presented before you, the Exhibit I, my client was told to disregard the information regarding all those things he's been hearing about other people being transferred, that that was simply a rumor, that those things are not true. Well, you don't rush and file a complaint based on mere allegations that cannot be substantiated. My client is an attorney and a judge for that matter and he knows that. He had no way of knowing, whether this -- that this information were actually true or whether they were just rumors or fabricated lies.

Not until September of 1999, when he became aware, clearly aware that this information, these other parties were being transferred, that was when he decided to file that complaint in October of 1999.

The defense argument that my client's complaint is untimely is simply not true, Your Honor. My client relied on the advice that he was given by the same officials who set out to mislead him. Obviously they had their intent, Your Honor. The intent was, let's mislead this man enough, just maybe we'll find a way to claim that, "Oh, you did not bring your claims timely."

The truth of the matter is, Your Honor, and the factual basis that his claim dispute here is, why would Judge Momah be given the position of an administrative law judge in Memphis, Tennessee if he is grossly incompetent, if he had misconducts such as the ones described by the defendant? I hope the agency is not saying that they like to promote incompetent and people who commit misconduct to positions of power and authority, because if that's the case, then may God

save those who come before those agencies, Your Honor.

Secondly, why would the agency tell Mr. Momah that he should stay in Memphis because of the inventory in Memphis, that if he reduces the inventory down, he'll be transferred. I'm sure that a reasonable juror would like to hear the answers to those questions. Why would the agency not reveal to Mr. Grabon or Judge Audrey Scott, when Judge Momah applied for the position in Memphis, that he had misconduct problems. That has never been answered. I'm sure that a reasonable juror would like to hear the answers to that question.

Why did Mr. Grabon treat defendant differently than from other candidates who were selected for administrative law judge. Why would he investigate my client?

Well, let the record reflect, Your Honor, that my client was well investigated by Mr. Grabon before he reluctantly agreed for him to become a judge in Memphis. If there were anything that were derogatory about my client's performance or competency level, that would have been raised and that would have prevented him from becoming a judge in Memphis. But that was not the case.

I believe those things, Your Honor, raise questions of fact, questions that both the plaintiff and the defendant clearly disagree on right now. Those are issues that the jury has the right to listen to and make a determination.

There are so many other things that were raised by counsel in their brief, Your Honor, that we also addressed, in our brief, but I would like to point out one important issue, that is, the issue regarding the parties in Detroit, Gail Cober and Mimi Gendreau. Ms. Gail

Cober disliked my client. She disliked him so much that she was not willing to have him come back to Detroit. My client, Your Honor, there's no secret, he's an African-American originally from Nigeria. He speaks with an accent such as that of counsel. There is no secret about it. He cannot hide from the person that he is. And yet Mr. Grabon, Ralph Soto and everyone within the agency claim they didn't know his background. It is like asking someone to disregard the American flag that is before this Court, because it's crystal clear that my client speaks with an accent. Ms. Gail Cober once said that someone who speaks with an accent should not represent the government of the United States. That is an outrage. That, Your Honor, is an outrage.

Andrew Sheppard in his deposition contradicts everything that the defense has put forward. Andrew Sheppard was a deputy district director under Mr. Neeley. Andrew Sheppard testified that if Mr. Neeley wanted he could have given the position to Judge Momah. There was nothing preventing him from giving Judge Momah that position. Mimi Gendreau and Gail Cober clearly stated they did not want him back there. Mr. Neeley did not have sufficient amount of working experience with Judge Momah to make a determination regarding his conduct.

They claim my client had problems. Mr. Dushman was a supervisor, yes, in Detroit. However, Your Honor, what the defense will fail to tell you is that Mr. Dushman was demoted because of lack of good performance. Mr. Dushman had a problem when he was transferred to Albuquerque. He could not perform in Albuquerque, yet he requested a transfer on hardship back to Detroit. Well, guess what? They let him back in.

They even threw a party for him, Your Honor.

How can a man -- obviously Mr. Dushman is a white male, that had a problem in Detroit, he was demoted. His performance level was not even close to my client. In fact, during the deposition of Gail Cober, she clearly attest that my client, while he was an investigator in Detroit, outperformed every other investigator for the same kind of cases that he did.

Well, it is understandable, Your Honor, that my client may have more complaint from, of course, the general public, because he did more work. That's not unusual. And everyone in the department has said it's not unusual to have people complain about investigators.

But Mr. Dushman was welcomed back with open arms despite all the problems he had in Detroit, despite all the problems he had in Albuquerque. Your Honor, I believe that the jury would like to hear that. Why would a white male be treated so differently? Mr. Dushman is the perfect person that should be used to compare Judge Momah, because they were on the same level here in Detroit when he left Detroit.

There are so many other things that I would like to point out to Court, however, I think it would be belaboring everything that we have already put down on paper. I will allow the Court to make a determination, and that determination, Your Honor, should be that this case should be allowed to go to the jury. There is no doubt that if the jury hears the information that is contained within these briefs and exhibits itself, they will come to the conclusion that Judge Momah was, in fact, discriminated against. Thank you, Your Honor.

THE COURT: Excuse me. What was his disability?

MR. IBE: Judge Momah had -- there are two things,

Your Honor. Thanks for that question, Your Honor. Judge Momah had a heart condition that required him to take medications. That heart condition based on his doctor's -- the prognosis that was given to him was exacerbated by the stress of his child's illness and the stress at work, that one day while he was at work, Judge Momah actually passed out at Indianapolis and was taken to the emergency room. Frankly, he did not even know where he was.

These doctors were so afraid for his condition that they said he needs to get away from his job until he is good enough to go back.

And secondly, while this may not have been decided by the Courts, his child's disability, the illness of his child is also a disability, Your Honor, that can be imputed to him, because he is the father of that child and he is also responsible for that child. Those two information regarding his heart condition, as well as the illness of his child was clearly aware to his employers. They knew this. They did not accommodate him, Your Honor.

That's the disability that he had, Your Honor.

THE COURT: Thank you.,

MR. IBE: Thank you, Your Honor.

THE COURT: Brief rebuttal, brief.

MR. CAPLAN: I don't believe there's any evidence that anybody in Detroit who was making the decisions or anybody in Washington knew about this heart condition, and I don't believe that any condition his daughter had makes him a handicapped individual within the meaning of the anti-discrimination statutes.

Briefly, with regard to Dan Dushman, he came back as an investigator. He wasn't applying for the administrative judge position that plaintiff wanted to come back to. By the time Dushman did come back in

September of '99, by that time plaintiff had withdrawn his request to come back as an investigator. He wanted to come back as an administrative judge, a position that was not filled when Washington gave an approval until 2001.

How did he get the job in Memphis if he did such a bad job in Detroit? Because Memphis failed to call Detroit. Happens -- bad job by Memphis.

Finally, he didn't know until '99 he claims that he was the victim of discrimination. I would ask the Court to take a look at paragraph 17, I believe, of what he calls his consolidated affidavit in response to the motion for summary judgment. And if that's not clear enough, pages 138 through 140 of his volume 2 of his deposition, I will just be very brief,

"But you felt that he had some --" and "he" is Walt Grabon, his district director in Memphis, who he claims orchestrated the denial of his transfer back to Detroit.

"You felt he, Walt Grabon, he didn't think the same of you that he thought of other white people?" Answer,

"Yes."

"You knew that as of August of '98?" "Yes."

"Because as of August of '98 you had spoken with Grabon and he sort of tore into you and said 'don't bother making a second request, it would not be approved,' and he said that rather angrily, right?" Answer,

"Yes."

"And he really didn't have any reason to be angry at you, did he?"

"No."

"And you feel that, you know, at least was an ingredient in your mind that this man is a

bigot?"
Answer,
"Yes "
"And you knew that as of August of '98, right?"
Answer,
"Right."
Et cetera, et cetera.

This plaintiff clearly knew at least as of August of '98 in his mind that he was the victim of illegal discrimination. Similarly

THE COURT: What did the affidavit say?

MR. CAPLAN: I don't have that with me, but it suggests -- it states something along the lines of well before November of '99 or October of '99 he was aware that the -- that in his mind these actions were motivated by anti -- by discrimination. Thank you.

I threw everything into the briefcase I thought I would need and, of course, the one thing I thought I needed

THE COURT: Well, it does appear on the undisputed facts of record in this case that the Court must grant the full summary judgment which is requested by the plaintiff -- by the defendant.

First of all, the plaintiff was informed that his request for transfer had been denied in February and September of 1998. 29 C.F.R. requires that the plaintiff should have made contact with the EEO counselor within 45 days of the matter alleged to be discriminatory, or in the case of a personnel action, within 45 days of the effective date of the action.

The plaintiff did not contact a counselor until October of 1999. Under the Morgan case, his complaints were clearly untimely, and the evidence does not support his claims here that he had no awareness of the discriminatory basis alleged against his supervisors.

He, clearly on the undisputed facts, was aware of the fact that he had some basis in discrimination for the claims he was going to make within the 45 days required by Morgan.

Also, an ALJ position did not exist at the time he was seeking his transfer to that. And as for the investigatory position, the defendants have presented substantial legitimate reasons for not granting the plaintiff that position.

In addition, he has failed to present evidence of any similarly situated employee who was granted reassignment to an administrative judge position in Detroit during the time period during which he was requesting a transfer. So his motion for summary judgment on that issue alone must be granted, the defendants' motion.

On the disability act claim, the summary judgment motion of the defendant must be granted. The plaintiff has failed to present any evidence that he suffered from a disability and that his employers or the active persons among his employers knew anything of a disability or the disability that he claimed.

And of course, his child's disability, if it indeed exists, cannot be imputed to him.

His claims for discriminatory action having occurred while he was in Indianapolis are subject to summary judgment because there is no evidence or real argument to refute the defendants' undisputed contentions regarding all the claims regarding discrimination while there.

In Memphis, summary judgment must be granted on his claims because the performance rating of proficient which he was given in 1998 appears to be supported on the record and the claim is untimely, of course, because it did not occur until -- well, he did not

contact the counselor for more than a year after the rating had occurred. But there is no evidence that he deserved a rating higher than proficient in 1998.

Summary judgment has to be granted concerning Grabon's propensity to discipline the plaintiff. Actual evidence has suggested that there is no record of discipline against the plaintiff, and furthermore, that white administrative judges have been disciplined. So there is no evidence presented to raise a question of fact as to that claim.

The chairwoman's award claim is subject to summary judgment as well. The plaintiff has not pointed to any evidence that his supervisor discriminatorily prevented him from obtaining the chairwoman's award. There is no evidence that he merited that award or that a similarly situated employee outside of his protected class received such an award.

Summary judgment is also granted on his claim of delay of promotion. He was granted a promotion soon after his supervisor recommended him for it. And there is no credible evidence or no evidence offered to contradict the defendants' undisputed factual allegations in that regard.

The summary judgment is granted concerning obstruction of the processing of the EEO complaint. The plaintiff has failed to raise any question of fact supporting that claim and the undisputed facts suggest that it is not so. So no discrimination claim may be brought concerning processing of the EEO complaint.

Finally, the retaliation claim is subject to summary judgment because the plaintiff has failed to establish a causal connection between his filing of an EEO complaint and being denied a hardship transfer. Without that element, there can be no claim, and

therefore, summary judgment must be granted on that claim.

So for those reasons, the defendants' motion for summary judgment must be granted in its entirety. Is there an order?

MR. CAPLAN: No, but I will present one, Your Honor.

THE COURT: Thank you.

MR. IBE: Thank you, Your Honor. THE COURT: Thank you.

(Court-in recess at 10:44 a.m.)

APPENDIX F

Answers to Investigator's Questionnaire
EEO Complaint No. 0-0000003-ME
witness: Audrey M. Scott
Supervisory Administrative judge Memphis District office

EXHIBIT 1

1. Question: was Complainant due for a promotion on or around December 7, 1999? Explain in detail. was his promotion delayed? Explain in detail.

a. Yes, Mr. Momah was eligible for promotion on or around December 7 1999. This is the reason 1 submitted a memo to Mr. Walter S. Grabon, District Director, on November 22, 1999, recommending Mr. Momah for promotion to the GS-14 level. At the time, Mr. Momah had been a GS-13 for slightly less than one year. However, I knew that the one year time in grade restriction did not apply because Mr. Momah held an excepted service position, as opposed to a position in the competitive service.

b. sometime after submitting the recommendation(I am not sure of the exact date), Ms. Doris woods advised me that Mr. Momah's promotion would be delayed because of the time in grade restriction. During this conversation, I reminded Ms. Woods that the time in grade restriction was not applicable to excepted service positions such as that of an administrative judge. Ms. Woods then said that she would check with Minnie Johnson, the Administrative officer, and get back with me later. Later, Ms. Johnson called and told me that Mr. Momah would have to wait until February 2000 to get promoted because he had not held an attorney position before coming to EEOC.

2. Question: were you on a medical leave of absence during December and January of 1999, during the time Complainant was due for a promotion? Explain in detail. During your medical leave of absence from work, do you recall talking with Mr. Grabon concerning Complainant's promotion to GS-14? Explain in detail. Did you concur with Mr. Grabon that Complainant should wait for your return from your leave of absence for his promotion? Explain in detail.

ANSWERS:

a. No, I was not on medical leave during December and January 1999.

I had been on medical leave the year before, from October 23, 1998 to January 4, 1999. During that time, Mr. Momah became eligible for promotion to a GS-1.3. Ms. woods was in charge of the Hearings unit during my absence, and was responsible for all personnel actions including promotions.

b. During my leave of absence, I never, at any time, spoke with Mr. Grabon about Mr. Momah's promotion or about an one else's promotion. I did not speak to Mr. Grabon at all during my absence from work.

c. No. As stated above, Mr. Grabon and I did not have any conversations during my medical leave of absence.

3. Questions: Did you during a conversation with Mr. Grabon approve a promotion of a white female Administrative Judge? Explain in detail and identify this employee by name, race, and grade. Did you a prove the white female's promotion while you were on medical leave of absence? Explain in detail. was complainants promotion due before his white female coworker? Explain in detail.

Answer:

a. No, I did not approve or recommend the

promotion of a white female. During my medical leave, I did not have any conversations with Mr. Grabon or Ms. Woods regarding the promotion of a white female Administrative judge.

b. The employee in question is Barbara Kimmelman, Gs-13. Ms. Kimmelman, a white female, was hired as a GS-11 Administrative Judge in June 1998.

c. No. Ms. Kimmelman's promotion to a GS-12 was never discussed with me. Therefore, I was not able to approve or disapprove her promotion. Ms. Kimmelman was promoted to the GS-12 level in November 1998, when I was out on medical leave. when I returned to work in January 1999, Ms. Doris Woods, the Deputy Director, gave me the appraisals she had completed during my absence. At that time, Ms. Woods informed me that she had promoted Ms. Kimmelman to the GS-12 level during my absence. In addition, Ms. Woods stated that Ms. Kimmelman could be promoted to the GS13 level in three months because she was in an excepted service position. Later, I told Ms. Woods that I had some misgivings about promoting Ms. Kimmelman to the Gs-13 level so soon because I was extremely concerned about her production during my absence. Ms. Kimmelman had closed less than fifteen cases during the quarter I was absent from work. I told Ms. Woods that I needed more time to observe Ms. Kimmelman's performance before making any promotion decisions. Ms. Woods then assured me that this was my decision to make.

e. Mr. Momah was promoted to the GS-12 level in November 1997, and was due for promotion to the GS-13 level in November 1998. His promotion was due before Ms. Kimmelman's promotion.

4. question: Did Mr. Grabon need your approval

before promoting an Administrative Judge under your supervision? Explain in detail: Do you know of any AJs who were promoted by Mr. Grabon without your approval? Explain in detail and identify each person by name, race, sex, national origin and disability.

Answer:

a. Theoretically, Mr. Grabon does not need my approval to promote AJ's . He is, after all, the director of the office. However, Mr Grabon does not directly supervise the AJ's, and is not aware of their performance on a daily basis. i, as the immediate supervisor, have intimate knowledge of AJ's performance, and I am in a better position to decide if promotion is warranted. Therefore, I make the recommendations for promotions of AJ's in the Hearings unit.

b. I do not know if Mr. Grabon initiated Ms. Kimmelman's promotion or not. As stated, Ms. Woods told me that she had promoted Ms. Kimmelman. Mr. Grabon may have concurred in this decision. The only AJ who has ever been promoted without a recommendation from me is: Barbara Kimmelman, white, female, American, no disability as far as I know.

APPENDIX G

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Q: Okay.Thank you, Judge. Now, prior to offering the position to Davidson Momah did you do any kind of background check such as contacting prior supervisors in the Detroit District?

A: Yes.

Q: All right. Could you please tell us specifically what that entails?

A: I contacted the - it was someone - I don't think I told you the candidates I would be contacting, references, their supervisors, whomever in the office to get some information about them.And I recall that with Davidson I contacted the -- I believe that person - and I can't recall his name right now. He was the deputy director in Detroit.

Q: Would that be Andrew Sheppard?

A: Yes, I contacted him concerning Davidson. And I'm not sure whether he was aware that Davidson had applied for the position, but we did speak about Davidson's performance and all of that.

Q: Okay. Now, when you contacted the Detroit District, did they recommend David for the position?

A: Yes.

Q: Okay. Did anyone from the Detroit District raise

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Q: Is it your testimony before that no one raised any issues prior to you making your decision - no, I'm sorry. Strike that.

Is it your testimony that nobody from the Detroit District raised any issues of concerns regarding David's performance or conduct before you made your decision to hire him?

A: No, no one.You're correct about that.There was no issue raised concerning his performance conduct. (A

brief discussion was had off the record.)
BY MR. IBE:
Q: All right. Now, at the time you recommended judge Momah for the position in Memphis did anyone oppose Judge Momah's selection at the Memphis District?
A: In the Memphis District office?
Q: Yes.
A: I made the recommendation, because -- this was a very well thought out selection process, recommendation process, because I was comparing the qualifications of the candidates to the skills that I felt were necessary in that position, given the nature of the position.
Q: Okay.
A: And Davidson floated to the top of the list. I

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A: As I stated, Doris Woods was the deputy director. She was my supervisor. She had responsibility for the unit and she did those evaluations.
Q: Okay. She conducted an evaluation for Davidson Momah and that of the other judge, that would be Barbara Kimmelman
A: Right. And, of course, we had a legal technician in the unit, Priscilla Anderson.
Q: Okay. Was Judge Barbara Kimmelman promoted in 1998?
A: Now, I found out about that upon my return. I returned to work on January 4th, 1999 off medical leave, and at the time I spoke to Doris Woods .And Doris told me that she had evaluated Barbara and Davidson during my absence, and she gave me a folder I believe with the appraisals.

And she also said that Davidson had been asking about

his promotion, but that he hadn't I done anything with that.And she also advised me that Barbara had been promoted to the next grade in the career ladder and that, of course, she said Barbara was -- because they were in the excepted service, Barbara didn't have to wait the year and she would be - she could be promoted to the next level within 90 days or something to that effect.

Q: What about David, did she tell you why he was not promoted?

A: No.

Q: Could she have promoted David as well?

A: Yes.

Q: But she did not?

A: She did not.

Q: Okay. Now, Barbara'a promotion to the next level that you described, is that something that was higher than David's position?

A: No.

Q: I'm sorry?

A: No. No, it was not.

Q: Okay.At what level were they hired in, Barbara and David?

A: Both of them were hired in at the lowest possible level I believe which was a Grade 11.

Q: Grade 11?

A: Um-hmm.

Q: All right. So when Barbara was promoted she was promoted to - would that be Grade 11,12 then?

A: That would have been a Grade 12.

Q: While David remained at Grade 11?

A: Davidson had been hired before Barbara. He was already a Grade 12.

Q: He was already a Grade 12?

A: Right. He was trying to get promoted to Grade 13.

Q: Okay. Based on your testimony earlier and the information that you know in your capacity throughout your time at the EEOC could Walt Grabon and Doris Woods have promoted Davidson while you were out on medical leave?

A: Well,they could have promoted Davidson while I was away. He was due for promotion. He could have been.

Q: Now, did you recommend Judge Kimmelman for promotion before you left on medical leave?

A: No.

Q: Do they need your recommendation for promotion of judge Kimmelman or Davidson Momah?

A: No, I don't think so, because apparently they did not obtain it. Usually you talk to the supervisor before you promote.

Q: But Walt Grabon or Doris Woods, none of them called you before promoting Barbara Kimmelman?

A: No, they did not call me at all.

Q: Now, let me divert a little bit. We're going to get back to the promotion issue. Let's go to the production. Now, did you testify earlier that the judges are assigned production quotas?

A: They are not - they were not assigned quotas per se. It's a very complicated situation.The union would have been all over management had they told a judge or any other professional in the office that you have to close ten cases this month or something to that effect.

The way we did it -- because the office had a production requirement.The way we did it, we gave them time frames for processing cases. I believe the union or it could have been Federal Labor Relations Authority that said we could do that. So we would assign -- at least I would assign the judges time frames for processing cases when I assign the cases and basically

saying these cases should be completed and closed by such and such a date.

And so that's how we determined really their productivity, looking at how they responded to the time frame.

Q: Okay. Now, based upon what you just described to us, how would you describe - strike that.

How would you compare Judge Momah's productivity to that of Barbara Kimmelman?

A: Actually, there was no comparison. Davidson was a very productive person within the unit. He led the unit in terms of the cases that he processed.

And I believe at that time, the time that we're talking about, around in November or December 1998, as I stated Barbara had just come into the unit around in June of that year, I believe.And she was having problems adjusting to the type of work that we did, because she had to come in and learn a totally different area of law, and plus be able to do it in a timely fashion. Although there were no official production requirements, I mean you couldn't sit there and do nothing.You had to produce, and that's why I say it's a very complicated issue.

Barbara was struggling, and Davidson was basically leading the unit. And I think this time that I was away Davidson was responsible for continuing Barbara's training. So he was providing a lot of assistance

Q: (Interposing) I'm sorry.We didn't get the last part of the sentence. Davidson was responsible for continuing Barbara's -

A: Right. He was continuing Barbara's training. He took on that responsibility during my absence promoted within the 90-day period because, of course, we were in the excepted service and didn't have to wait for one year before being promoted. And so that would be

considered fast track, that you go 90 days, every 90-day period you get another promotion. And I basically said no, I didn't think Barbara deserved that.

Q: Was Judge Momah ever promoted to level G-13?

A: Pardon?

Q: Did there come a time when Judge Momah was promoted to Level G-13?

A: Let me explain that.When I got back to the office in January and - now, let me backtrack on that. Davidson had called me at home before I came back and he appeared to be very upset. And he told me. that he had not - his promotion hadn't come through to the next level. And I was quite surprised at that, because I - you know, and I didn't think he was-- you know, I said, well, maybe you could be mistaken, because he I said something about Barbara being promoted. Well, when I got back to the office, Doris told me that this had indeed occurred.

So at that point the first thing I did was to make a recommendation for Davidson's promotion. And I think initially I may have sent an E-mail to Doris recommending Davidson for promotion.And Doris E-mailed me back and said, well, print that out, because it has to be printed out or something in hardcopy or something like that, so I did.

And Doris contacted me again and said, well, something about complaint or something to that effect, that I had to address something. I forgot what she said. And I remember doing that, too.And I still insisted that he be promoted to the next level.And he was promoted, but this was sometime I know after I returned in January.

Q: Okay. And when did that promotion take effect, the G13?

A: I don't know when it took effect. Usually what I did was made the recommendation and they took care of

everything from that point on.

Q: All right. Did you recommend Judge Momah for another promotion in December of 1999?

A: Yes.

Q: Okay.Was he promoted?

A: I don't remember when that date was.There did come a time when I made a recommendation for Davidson to be promoted to Grade 14 level.And again, I said that was sent to Doris Woods. And I'm not sure, it could have been in November of 1999, that I recommended Davidson to promotion to a Grade 13.

Q: Okay.You mean Grade

A: (Interposing) I did and I - Doris E-mailed me. She may have told me in-person, I'm not sure how this occurred, that Davidson could not be promoted then because he had not been in grade for one year. And so she said that Minnie Johnson was saying

something to that effect.

And I pointed out to Doris, well, you know Davidson is in the excepted service and there's no requirement that you remain in grade for one year.

And so then later on I got – it could have been an E-mail from Minnie Johnson. It could have been a memo in memo form stating that Davidson could not be promoted to - well, he had I to wait the entire year, because - how did they put it? He was not working as an attorney with EEOC or something like that prior to being hired as an administrative judge, although he was an attorney and member of the Bar. I don't know where Minnie got that from' because I don't think that it's not reflected anywhere in OPM rules or anything, but this is what Minnie said. And I think from the wording of the memo or the E-mail it was clear to me that the personnel technician had also taken the view that he didn't have to wait the entire one-year period.

Q: Okay.
A: Because I think Minnie made reference to that, but she said something about not being an attorney prior to -- not being an attorney with EEOC.
Q: Okay. Now, did Walt Grabon-
A: (Interposing) The year period had been extended, because Davidson did not get his promotion, in fact, until around February of 1999.1 think that's when it was. So if it's one year then it would be February of 2000. He may have gotten it then. I'm not sure. But she said that they weren't going to do it then.
Q: All right. What about Judge Kimmelman was she ever promoted to grade level -
A.13?
Q: Yes.
A: Yes, she got a promotion to a 13. I recommended her to 13 later on when her performance improved. It was within I think a year after she had been
***
the stress involved in that position. I was the chief basically. It's a very stressful situation. It was causing a lot of health problems for me. Also, as I stated, I had not been there since - I was working,from home.They allowed me to work from home from February up until the time that I actually retired. I had made a request for disability retirement through the Office of Personnel Management.That could have been January or February. I'm not sure what the date was that I made the request.
So it was well-known and Doris was aware that I would not be there any longer and they knew that they had to replace me. And so I wasn't upset about that or anything, because I knew that they had. And we later got word from OPM some months later. I think this is prior to June that my request had been approved.

Q: Okay.
A: And then later I think the last thing I did for EEOC was around in June. I went to Washington, D.C. to be a panelist at the administrative judge training conference, and that's where I met Zia personally. I had talked to her over the phone.
Q: Do you know if Judge Momah, Davidson Momah,ever applied for the position to replace you?
A: Yes. Doris told me that Davidson had applied.
Q: Now, was Judge Momah's name on the cert?
A: No.
Q: Was Judge Momah interviewed by the panel?
A: No.
Q : Okay. Who set up the panel?
A: I have no idea.
Q: Okay. Do you know what standard was used to determine those who will be on the cert?
A: I don't know.You have to ask Minnie Johnson that.
Q: Now, in the course of you meeting with the panel regarding judge Zia, Z-i-a did you find out any information concerning judge Zia's credentials?
A: Yes. Zia had been an administrative judge for the EEOC in the early years, because I think at that time I was one of the oldest administrative judges in the country, not in terms of years, but I had been there almost since the beginning.And Zia was with the first group of administrative judges they hired back in 1979. I was part of that group.
And Zia had been hired and was working in Charlotte, North Carolina, somewhere in North Carolina. But Zia left the Commission later in the '80s sometime. And at the time that she applied for the position Zia was working as a writer with the Social Security Administration in North Carolina.

MR. MOMAH: Rickie?
MR. IBE: Yes.
MR. MOMAH: Let me talk to you. (Briefly off the record.)

BY MR. IBE:
Q: All right. Judge Scott, I appreciate your patience with us. I will not be - I will not take up too much time anymore. I have just a few more questions left.
A: Okay.
Q: And then I will let Mr. Caplan proceed with his cross-examination. So please bear with me for a few more minutes.
A: Okay.
Q: Thank you. We were on the issue of Judge Zia prior to the brief break.
Were you surprised that judge Momah's name was not on the cert?
A: Was I surprised.?
Q: Yes.
A: I was because Doris had told me he had applied. i And he was not on the certificate and I didn't - as I said, Minnie Johnson is the one who prepares the certificate. I don't know what criteria she used. I think you have to ask her about that.
Q: Okay.Was Judge Momah qualified to do the job in Memphis?
A: To do the job?
Q: Yes. Could Judge Momah have done the job?
A: Well, what job? As the supervisor of the unit?
Q: Yes.
A: Yes, he could. Now, Davidson - by that time Davidson had been in hearings for some time and had established a pretty good record up there in Indianapolis.

Q: Do you know if Walt Grabon, Ms. Woods or Minnie Johnson, did they take any steps to find out background information concerning Judge Zia before judge Zia was hired

A: Whether they did. No.That was the job of the panel.

Q: Okay. And did the panel do that?

A: Yeah, we did. I think with Zia - I didn't do it personally, but as a panel we talked. And I believe there had been some discussion with Zia's EEOC supervisor.

And let me say that Zia after she

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RELEVANT PROVISIONS INVOLVED

42 U.S.C. Section 2000e-3 (a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicant for employment,....., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Civil Rights Act of 1964 as amended[1] (42 U.S.C Section 2000e et. Seq) Section703 (a)

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[1]It is important to note that:

> The 1964 Act did not, at the outset, apply to the federal government. In 1972, the Act was amended by Public Law No. 92-261, making for the time that discrimination on the bases of race, color, sex, religion, and national origin in the federal government was prohibited by statute. Prior to that time, Executive Order 11478 prohibit discrimination in the federal employment. Responsibility for enforcement was delegated to the now defunct Civil Service Commission." Ernest C. Hadley, *A Guide To Federal Sector Equal Employment Law and Practice*, P. 913, Dewey Publishing, Inc., (16th edition 2003).

provides:

> It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 706 states:

> (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704.
>
> (b) Whenever a charge is filed by or behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful

> employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days and shell make an investigation thereof.

In addition to the above applicable rules, Federal Rules Of Civil Procedures, Rule 56 {C} permits summary judgment only "If the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The evidence, and any inferences concerning the facts, must be viewed in the light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U. S. 574, 587 (1986).

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No. 06-368

In the Supreme Court of the United States

DAVIDSON MOMAH, PETITIONER

v.

CARI M. DOMINGUEZ, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court should vacate the judgment and remand the case for reconsideration in light of *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006).

2. Whether a federal employee's allegation that his employing agency's equal employment opportunity office did not properly investigate his discrimination complaints precludes the district court from granting summary judgment in favor of the agency in his ensuing Title VII suit.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Burlington N. & Santa Fe Ry. v. *White*, 126 S. Ct. 2405 (2006) 9
Jordan v. *Summers*, 205 F.3d 337 (7th Cir. 2000) 11
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 8
Smith v. *Casellas*, 119 F.3d 33 (D.C. Cir. 1997) 10

Statutes:

Rehabilitation Act of 1973, 29 U.S.C. 791 7
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 7, 9, 10

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CARI M. DOMINGUEZ, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-25a) is not published in the *Federal Reporter* but is reprinted in 175 Fed. Appx. 11. The orders of the district court granting respondent's motion for summary judgment (Pet. App. 28a) and denying petitioner's motion for reconsideration (Pet. App. 26a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2006. A petition for rehearing was denied on April 17, 2006 (Pet. App. 1a). On July 7, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 14,

2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a black native of Nigeria who emigrated to the United States in 1980. Pet. App. 3a. After graduating from law school, he began work in April 1994 as an investigator in the Detroit, Michigan office of the Equal Employment Opportunity Commission (EEOC). *Ibid.* In 1997, petitioner applied for and received a position as an administrative judge in the EEOC's Memphis, Tennessee office. *Ibid.* Shortly following his move to Memphis, petitioner was hospitalized after a white supremacist assaulted him at a gas station. *Ibid.* Petitioner had originally planned for his wife and daughter to join him in Memphis, but as a result of the attack, his wife refused to move to Memphis and insisted that he transfer back to Detroit. *Id.* at 3a-4a. Petitioner ultimately decided to seek a hardship transfer when his daughter began experiencing health problems. *Id.* at 4a.

In a letter dated February 3, 1998, EEOC headquarters denied petitioner's hardship transfer request. Pet. App. 4a. After consulting with the director of the Memphis office, the reviewing EEOC official had determined that the needs of that office were too great at that time for petitioner to leave. *Ibid.* The letter stated that the EEOC would "be happy to reconsider [petitioner's] transfer request" if the workload and staffing of the Memphis office were to change. *Ibid.* The Memphis director met with petitioner and explained that due to the office's backlog, petitioner's continued presence would be necessary for at least six months. *Id.* at 4a-5a.

After six months, petitioner met again with the Memphis director. Pet. App. 5a. The condition of petitioner's daughter had worsened, as she had been diagnosed with scoliosis. *Ibid.* Petitioner expressed his willingness to accept any position in Detroit, including as a temporary administrative judge or even as an investigator. *Ibid.* He also offered to pay his own moving expenses. *Ibid.* The Memphis director told him that his transfer request would not be approved, but that he should go ahead and contact headquarters about it. *Ibid.*

Petitioner submitted the second transfer request to EEOC headquarters, and also traveled to EEOC headquarters to discuss his concerns with officials there. *Id* at 5a-6a. They informed him that the low workload in Detroit prevented a transfer there, but suggested that he consider a transfer to Indianapolis, which would bring him closer to Detroit than his current Memphis posting. *Ibid.*

On September 8, 1998, the agency formally denied petitioner's second request for a transfer to Detroit. Pet. App. 6a. In making this decision, headquarters had consulted with the Detroit field office. *Id.* at 6a-7a. That office reportedly did not want petitioner back, due to problems during his previous posting there. *Id.* at 7a. The Detroit office had held a meeting about petitioner's possible transfer. *Id.* at 5a. The deputy director of the office, a black male, had expressed no difficulties with petitioner returning, but the enforcement manager, a white female, had objected. *Id.* at 5a-6a. Petitioner claims that the enforcement manager and another white female, an administrative judge, had put pressure on the director of the Detroit office to convince headquarters to deny the transfer. *Id.* at 6a. The director of the Detroit office, however, stated to petitioner that he had played

no role in the denial of his transfer other than reporting to headquarters about the workload in the Detroit office. *Id.* at 7a.

Petitioner sought reconsideration of the denial from the headquarters officials, who again informed him that petitioner would not be granted a transfer to Detroit. Pet. App. 7a. Petitioner began to complain to the Memphis director that he was receiving discriminatory treatment. *Ibid.* In September 1999, roughly a year after his second transfer request had been denied, petitioner learned that a white investigator, who had previously moved from Detroit to Albuquerque, had received a transfer back to Detroit for family reasons, despite a history of performance problems. *Id.* at 7a-8a. Petitioner subsequently renewed his request for a transfer, asking headquarters officials and the director of the Detroit office about vacancies and the workload in Detroit. *Id.* at 8a. The officials informed him that the situation had not changed, and continued to deny his transfer request. *Ibid.*

In October 1999, petitioner contacted an EEO counselor, alleging that the transfer denials were discriminatory. Pet. App. 8a. On November 24, 1999, he filed a formal EEO complaint, claiming that the agency discriminated against him on the basis of race, color, national origin, gender, and disability, and had retaliated against him for the exercise of protected rights. *Ibid.* He specifically alleged that the agency had discriminatory and/or retaliatory reasons for denying his transfer requests, revoking an offer to transfer him to an administrative judge position in Indianapolis, rating him as "proficient" rather than "outstanding" in a November 1998 performance review, delaying his promotion from GS 12 to GS 13 from December 1998 to February 1999,

and delaying his promotion from GS 12 to GS 13 from December 1999 to January 2000. *Id.* at 8a-9a.

In a letter dated May 26, 2000, the EEO office notified petitioner that it would accept for investigation only his claim regarding transfer requests (which it treated as a continuing violation) and his claim regarding the most recent promotion, finding the remainder to be untimely. Pet. App. 9a. During the investigation of those claims, petitioner learned that during the time his transfer requests were pending, the agency had granted requests from several white females relating to employment in the Detroit office, including rehiring one as a contract employee performing budget analysis, allowing another to transfer from New York as an investigator while she attended law school in Ohio, and temporarily shifting a third from an attorney position to an interim position as a non-permanent administrative judge. *Ibid.*

In April 2000, the agency offered petitioner a transfer to Indianapolis, which he accepted. Pet. App. 9a. Petitioner claims that he accepted the transfer because agency officials had promised him a transfer to Detroit as soon as a position became available there. *Id.* at 10a. He further claims that his time in Indianapolis was difficult, as there was tension with his supervisors regarding his use of personal time for visits to his family in Detroit. *Ibid.*

Petitioner sent another letter to EEOC headquarters on May 25, 2000, again requesting a hardship transfer to Detroit. Pet. App. 10a. He and his attorney went to EEOC headquarters to discuss this latest request in person; EEOC informed him that a transfer would be impossible, due to the Detroit office's budgetary constraints and lack of a vacancy. *Ibid.* The EEOC also responded negatively to oral inquiries regarding a

transfer to Cleveland or back to Memphis, stating that the former office was overstaffed and the latter lacked a sufficient budget. *Ibid.* On June 27, 2000, petitioner's most recent request for a transfer to Detroit was formally denied on the ground that no funded vacancies existed in that office. *Ibid.* Petitioner shortly thereafter requested reconsideration and submitted yet another transfer request; in a letter dated August 24, 2000, the EEOC informed petitioner that Detroit's vacancy situation had not changed. *Ibid.* Petitioner then took a medical leave of absence for depression and work-related stress from September 2000 to April 2001. *Id.* at 11a.

Soon after petitioner returned, the EEOC received permanent funding for a permanent administrative judge position in the Detroit office. Pet. App. 11a. Petitioner applied for the position and was considered along with other applicants, but the EEOC eventually selected the candidate who had been filling the role on a temporary basis. *Ibid.* In October 2001, petitioner received and initially accepted a transfer back to Memphis as an administrative judge. *Ibid.* However, a dispute ensued as to who would bear his relocation costs and when he would have to report for duty, and petitioner ultimately declined the transfer. *Ibid.*

On June 4, 2002, the EEOC issued it final action on its investigation into petitioner's complaint. Pet. App. 11a. It affirmed the finding that several of his claims were untimely, and found no merit to his claims that, due to discrimination in and retaliation for protected activity, (1) his hardship transfer requests to Detroit had been denied, and (2) his promotion had been delayed. *Id.* at 11a-12a. It concluded that petitioner had not established that other similarly situated individuals had been treated more favorably or that any relevant

decisionmaker knew of any protected activity in which he had engaged. *Id.* at 12a. It further concluded that petitioner had in fact received a promotion on the first day possible and that he had failed to show that the agency's reason for denying his transfer requests (the lack of available positions in Detroit) was pretextual. *Ibid.*

2. On August 30, 2002, petitioner filed suit against the EEOC in federal court, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 791, and various other federal and state laws and regulations. Pet. App. 12a. The district court granted the EEOC's motion to dismiss as to all but the Title VII and Rehabilitation Act claims. *Id.* at 12a-13a.

The court subsequently granted summary judgment in favor of the EEOC on the remaining claims. Pet. App. 28a, 43a-46a. It agreed that petitioner had not made a timely EEO complaint with respect to certain claims, and determined that petitioner had presented insufficient evidence to support his various theories of discrimination and retaliation. *Id.* at 43a-46a. The court concluded that the transfer denials were not discriminatory, because (a) an administrative judge position had not existed in Detroit at the time petitioner sought it, (b) the EEOC had legitimate reasons for denying his request to transfer to an investigator position, and (c) petitioner had failed to show that similarly situated persons had been treated more favorably. *Id.* at 44a. The court also concluded that the EEOC had not denied the transfer requests in retaliation for the filing of petitioner's EEO complaint, because petitioner had failed to establish any causal connection between the two events. *Id.* at 45a-46a. The court furthermore determined that peti-

tioner "failed to raise any question of fact" that the agency had obstructed the processing of his EEO complaint and noted that "the undisputed facts suggest that it is not so." *Id.* at 45a. The court denied petitioner's request for reconsideration. *Id.* at 26a-27a.

3. The court of appeals affirmed. Pet. App. 1a-25a. The court held that the EEOC had waived its timeliness defense as to petitioner's Title VII claim that the agency had discriminated against him by failing to grant his transfer requests, *id.* at 14a, but proceeded to conclude that he had presented insufficient evidence to support it. It determined that petitioner had "failed to present direct evidence of discrimination," *id.* at 17a, and that he also could not make out a prima facie case of discrimination under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *id.* at 22a. The court concluded that denial of hardship transfers could not amount to actionable "adverse employment action[s]" for purposes of a Title VII discrimination claim. *Id.* at 19a.

The court likewise affirmed the district court's grant of summary judgment on petitioner's retaliation claims. Pet. App. 22a-23a. It rejected his claim that the agency had retaliated against him by denying his transfer requests, reasoning that "the denial of a purely lateral transfer without more is insufficient to constitute an 'adverse employment action' under Title VII." *Id.* at 23a. And it concluded that "no separate cause of action" existed for petitioner's allegation that the EEOC had retaliated against him by failing to properly process his EEO complaint. *Ibid.*

ARUGMENT

1. Petitioner contends (Pet. 14) that the court of appeals rejected his retaliation claim based on reasoning that conflicts with this Court's decision in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). In *Burlington Northern*, this Court held that Title VII's anti-retaliation prohibition is not limited to employment actions that affect the terms and conditions of employment. 126 S. Ct. at 2412-2413. Rather, the anti-retaliation prohibition extends to any action that a "reasonable employee would have found" to be "materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (internal quotation marks and citation omitted). Under that standard, "the significance of any given act of retaliation will often depend upon the particular circumstances." *Ibid.*

In rejecting petitioner's claim that the denial of his requests for a hardship transfer constituted retaliation for protected Title VII activity, the court of appeals considered whether the denial of petitioner's transfer requests would be objectively "adverse to a reasonable person," and concluded that it would not under the circumstances of this case. Pet. App. 21a. The court did not, however, frame this objective, "reasonable person" inquiry in the same manner as the Court in *Burlington Northern*. That is, the court of appeals did not consider whether the denial of petitioner's transfer requests would "have dissuaded a reasonable worker from making or supporting a charge of discrimination." 126 S. Ct. at 2415 (quotation marks and citation omitted). Accordingly, a remand is warranted to permit the court of ap-

peals to apply the *Burlington Northern* standard. The court of appeals' judgment should therefore be vacated and the case should be remanded for reconsideration of whether denying petitioner's requests for a hardship transfer constituted a materially adverse action under the *Burlington Northern* standard.

2. Petitioner next contends (Pet. 23-24) that summary judgment in favor of the EEOC is per se improper because the EEOC allegedly did not conduct a proper investigation of his EEO complaint. That contention is without merit and does not warrant review.

As a threshold matter, the district court found that petitioner had "failed to raise any question of fact supporting" his contention that the agency obstructed processing of his EEO complaint, and "the undisputed facts suggest[ed] that it [was] not so." Pet. App. 45a. That finding is sufficient to dispose of petitioner's failure-to-investigate claim.

In any event, there is no merit to petitioner's contention that an agency's failure to investigate precludes a grant of summary judgment on issues that were not investigated. That contention necessarily rests on the view that Title VII creates a cause of action that allows a federal employee to seek relief based on the EEOC's failure to investigate a charge of discrimination. As the courts of appeals have recognized, however, Congress has not authorized a cause of action against the EEOC "for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination charge." *Smith* v. *Casellas*, 119 F.3d 33, 34 (D.C. Cir. 1997) (per curiam) (citing cases from other circuits). Nor does Title VII grant a federal employee "an implied failure-to-process cause of action" when a federal employer allegedly fails to properly investigate his claim of

discrimination. *Jordan* v. *Summers*, 205 F.3d 337, 342 (7th Cir. 2000). There is therefore no legal basis for petitioner's failure-to-investigate claim.

Petitioner also contends (Pet. 24-30) that the lower courts improperly evaluated the evidence in granting summary judgment to the EEOC on claims that allegedly were not investigated. Pet. 24-30. That fact-bound question does not warrant review.

CONCLUSION

With respect to question one, the judgment should be vacated and the case should be remanded for reconsideration in light of *Burlington Northern*. With respect to question two, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2006